

REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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August 1, 2008 – June 30, 2009

Morris Woodruff
Reporter of Opinions

JEFFERSON CITY, MISSOURI
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PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning August 1, 2008 through June 30, 2009. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2000, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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OF THE
STATE OF MISSOURI**

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*

*Case No. EM-2007-0374
Decided August 5, 2008*

Electric §4. The Commission denied Public Counsel's application for rehearing because it correctly applied the not detrimental to the public interest standard by allowing the Applicants to establish that there was no competent evidence in the report that there would be any public detriment in relation to the company's credit-worthiness due to the merger.

**ORDER DENYING MOTIONS FOR REHEARING, CLARIFYING REPORT
AND ORDER, AND DENYING MOTION TO STAY AS BEING
MOOT**

Three parties filed applications for rehearing in this matter, the Office of the Public Counsel ("Public Counsel"); the Sedalia Industrial Energy Users' Association (SIEAU), AG Processing, Inc. ("AGP") and Praxair, Inc. ("Praxair") (collectively "Industrial Intervenors"); and Shirley and Allen Bockelman ("South Harper Residents"). Each allege that the Commission's July 1, 2008 Report and Order in this matter is unjust, unreasonable, arbitrary and capricious, and unlawful for a variety of reasons.

Public Counsel's Application for Rehearing

In paragraph 1 of Public Counsel's motion, counsel cites to pages 2411-2412 of the transcript to argue that the Commission's decision to sustain a single objection not to allow a particular inquiry into Kansas City Power and Light Company's ("KCPL") LaCygne project was in error. Public Counsel maintains that because the LaCygne project is included in Kansas KCPL's Comprehensive Energy Plan ("CEP") that

* The case was appealed to the Missouri Supreme Court and affirmed. See 344 SW 3d 178 (Mo banc 2011).

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it must be relevant.

When the Commission ruled on Great Plains Energy Incorporated's ("Great Plains") and KCPL's motion to limit the scope of proceeding to evidence relating to whether the merger met the not detrimental to the public interest standard, the Commission limited what was shaping up to be a "fishing expedition" into KCPL's entire CEP. That ruling limited inquires regarding the CEP to the inter-relationship between the latan projects and the acquisition of Aquila.¹

As the transcript reveals, the Regulatory Law Judge did not restrict inquires into all construction projects encompassed by the CEP; the objection was sustained because LaCygne was in no way tied to the merger case by the litigants. Staff stated that LaCygne was part of KCPL's CEP but gave no explanation as to how that project was interrelated to the merger or any issue surrounding the merger.

Public Counsel conveniently leaves out the two pages of the Transcript that follow the passage it cites. In those pages the Commission gives Staff the opportunity to make an offer of proof as to how the LaCygne project is relevant.² The Commission, upon hearing an offer of proof or additional explanation could have revisited the objection and the ruling at that time. Staff declined to make such an offer. All of the other parties, including Public Counsel, had the opportunity to revisit this subject matter with the witness being questioned, Mr. Giles. Any of these parties could have further attempted to make the relevance connection or elected to make an offer of proof at the time any objections were raised – none did.

Public Counsel's post-hearing argument that the LaCygne project had a bearing on the financial condition of companies and could indirectly affect the merger cannot reform the absence of that argument at the evidentiary hearing. Moreover, Public Counsel's statement that Great Plains and KCPL conceded that latan and LaCygne were one in the same is incorrect; at most, from the testimony cited by Public Counsel, witness Giles conceded that LaCygne was part of KCPL's CEP.

A full examination of the transcript, as opposed to Public Counsel's selective citation, reveals that LaCygne is not the same as latan. Regardless, at the evidentiary hearing, no party made an argument establishing the relevance of allowing such testimony. The

¹ Aquila is a joint owner of the latan facilities.

² Transcript, pp. 2412-2414.

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evidentiary ruling at hearing was not in error and this unsupported, isolated, post-hearing argument, when viewed in light of the overwhelming evidence supporting the Commission's decision, fails to establish sufficient reason for granting a motion for rehearing.

In paragraphs 2 through 13 of its motion, Public Counsel lists what it believes are errors with the Commission's April 24, 2008 evidentiary ruling limiting the scope of the evidence it would hear to evidence that was actually relevant to the merger proposal. Public Counsel erroneously believes that: (1) the Commission relied on inapplicable evidentiary standards; (2) Staff's investigation into corporate gifts and gratuities policies was not related to anonymous allegations contained in unsigned letters that were mailed to the Commission during the pendency of the proceedings; (3) the Commission inappropriately excluded all subject matter concerning the anonymous allegations; (4) there was no anonymous allegations issue in this case; and, (5) that the Commission attempted to reform its evidentiary ruling post hearing without giving the parties an opportunity to respond.

Public Counsel seems to be of the impression that well-settled evidentiary precepts applied in other Missouri adjudicatory settings have no bearing on administrative law. Public Counsel also confuses the recitation of the evidentiary standards with their actual application. The facts of every case will necessarily be different and the application of the law to those facts will undoubtedly produce different results. However, this does not change the law as determined by Missouri courts that apply to evidentiary rulings – even in an administrative setting.

The Report and Order is clear with regard to why the Commission found the particular subject matter at issue to be wholly irrelevant. The very first sentence of the section of the Order entitled "Conclusions of Law Regarding Evidentiary Ruling" is: "Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principal issue."³ The citation includes the reference to the *Cohen* case, which Public Counsel maintains is absent from the order. In fact, the Commission

³ *State v. Liles*, 237 S.W.3d 636, 638-639 (Mo. App. 2007); ***Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005)**; *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004); *Kendrick v. Board of Police Com'rs of Kansas City, Mo.*, 945 S.W.2d 649, 654-655 (Mo. App. 1997); *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 116 (Mo. App. 1995) (quoting *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 942 (Mo. App. 1992)).

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specifically applied that standard when it concluded that:

Under the relevance standard, the anonymous letters and the testimony about those letters just summarized, are clearly irrelevant and were properly excluded. This purported evidence tends neither to prove nor disprove any fact in issue and does not corroborate any other relevant evidence bearing on the principal issues before the Commission.”⁴

Whether or not there was an anonymous allegations issue and whether the companies’ gifts and gratuity policies were part of that issue are clearly interrelated. Staff framed this issue, along with two others,⁵ as being “Anonymous Public Allegations/Comments Related to Proposed Acquisition.”⁶ During the evidentiary hearing, Staff acknowledged that three scheduled witnesses were produced to provide testimony regarding the anonymous public allegations in relation to the gifts and gratuity practices.⁷ More importantly, however, Public Counsel overlooked the major basis for the ruling that the gifts and gratuities policies were wholly irrelevant, that being because the Commission lacks jurisdiction over such matters.⁸

Public Counsel continues its arguments regarding the anonymous allegations by alleging, post-hearing, that no such issue even existed and that the Commission’s Staff’s investigation into the subject matter listed under Staff’s “Anonymous Allegations” category began before the anonymous letters arrived. The anonymous letters at issue were filed in the docket on January 31, EFIS Docket No. 222 (received on January 28);

⁴ *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc. for Approval of the Merger of Aquila, Inc. with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, p. 24. (hereinafter referred to as the “Order” or the “Report and Order”).

⁵ As Staff’s counsel stated they encompass “the latan projects and other matters, merger-related matters” – some of which clearly are matters that were part of KCPL’s CEP. Transcript, pp. 2107-2108.

⁶ Second List of Issues and Order of Opening Statements, Witnesses and Cross-Examination, EFIS Docket Number 303, filed April 16, 2008.

⁷ Transcript, pp. 2102 -2108. Daryl Uffelman, Lynn Fountain and James Rose were being called was to testify regarding the anonymous public allegations. Commission released those witnesses in terms of testifying about the anonymous letters (Transcript, p. 2106); however, later the parties agreed to call James Rose to testify on other issues. Transcript, pp. 2805-2835.

⁸ Report and Order pp. 25-26.

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February 13, EFIS Docket No. 228; March 3, EFIS Docket No. 256, and March 17, EFIS Docket No. 265 (the latter three letters were filed on the same day they were received). While it is true that Staff's cover letter to its request for subpoenas to commence its investigation did not reference the initial anonymous letters, Staff's response to GPE/KCPL's motion for a protective order and to quash the subpoenas, filed on March 17 (EFIS Docket No. 263) did.⁹ Staff stated:

The subpoenas duces tecum, as will be related herein, are designed to receive documents and testimony from certain GPE / KCPL individuals to discover information, as quickly as possible, that is relevant to:

(a) GPE / KCPL's financial condition and credit worthiness as a result of the proposed acquisition of Aquila by GPE and the construction of environmental enhancement of latan 1 and the construction of a second baseload coal-fired unit referred to as latan 2 and

(b) matters relating to items set forth in three anonymous letters filed in Case No. EM-2007-0374 respecting the proposed GPE acquisition of Aquila and these latan projects. The Staff will proceed as directed by the Commissioners. (Emphasis added).

Nevertheless, the Commission was careful when issuing its evidentiary ruling not to exclude relevant evidence on the issues that were actually related to the merger application. The Commission heard substantial evidence on these issues, as the record reflects.

The Commission went to great lengths to ensure that appropriate witnesses were available to provide relevant testimony regarding the companies' credit-worthiness and how the latan projects, and KCPL's ability to manage those projects, might or might not have affected the companies' credit-worthiness in relation to the merger – **the same exact issues that were brought up in the anonymous allegations**. (Emphasis added). The Commission heard two full days worth of testimony concerning the companies' credit-worthiness and their ability to manage the latan projects.¹⁰ The Commission also re-opened the case on June 11, 2008, to hear additional evidence on the management of the latan projects in relation

⁹ GPE/KCPL's motion for the protective order and to quash the subpoenas was filed on March 12, EFIS Docket No. 250.

¹⁰ Transcript, Volumes 19, 20, 21 and 22, pp. 2397-2940.

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to a crane accident that had occurred at the construction site. The parties were allowed to present evidence on the completion deadline, cost effects and credit-worthiness implications the crane accident may or may not have produced.¹¹

The extensive testimony on the latan projects and the credit-worthiness issues came from sworn, competent witnesses that were subject to cross-examination, and the Commission did not release any essential witnesses.¹² In fact, the witnesses providing the testimony on these subjects were the same witnesses identified by Staff as those that were going to provide testimony regarding the anonymous allegations.¹³ The Commission required sworn witnesses to provide direct testimony regarding these subjects and would not rely on testimony about allegations sent to the Commission in the form of anonymous hearsay.¹⁴ The Commission did not rule that any and all underlying issues or subject matter that may have been touched upon in the anonymous letters and allegations were wholly irrelevant. The ruling encompassed the anonymous letters and allegations, and any testimony about those letters and allegations with regard to the specific issues as framed by Staff in its proposed list of issues.¹⁵

Public Counsel states that, as part of Staff's investigation, it and the Industrial Intervenors participated in taking depositions of KCPL and Aquila employees in which the progress of the CEP projects was a major

¹¹ Transcript, Volumes 25 and 26, pp. 3142-3233.

¹² To ensure that all essential witnesses were available to testify on the relevant issues, GPE/KCPL was required to produce six witnesses that they requested be excused. Transcript, p. 2117.

¹³ Mr. Schallenberg from Staff was one additional witness listed to testify regarding the topic of the companies' credit worthiness, and he provided that testimony. With exception of that one additional witness the witness lists for the topics of credit worthiness and the anonymous letters were identical and included: Michael Chesser, William Downey, Terry Bassham, Steve Jones, Lora Cheatum, Stephen Easley, John Grimwade, Brent Davis, Terry Foster, Chris Giles, Scott Heidtbrink, Max Sherman, James Rose, Daryl Uffelman, and Lynn Fountain.

¹⁴ The Commission released three witnesses, the ones scheduled to testify about the allegations made in anonymous letters concerning the companies' gifts and gratuities policies. Those three witnesses, as were previously identified, were James Rose, Daryl Uffelman and Lynn Fountain. One of those witnesses, James Rose, did provide testimony regarding another issue in the case. See Transcript pp. 2805-2835. Three other witnesses were released after Staff announced that it elected not to call them (i.e. Scott Heidtbrink, Steven Jones and John Grimwade). Transcript, pp. 2103-2104 and 2402.

¹⁵ See Transcript, pp. 2074-2120 (see in particular p. 2109) and 3082-3086. The Commission points out there was an error in the transcript that was corrected by order on June 9, 2008 – see Order Correcting Transcript; EFIS Docket No. 471.

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point of inquiry. Indeed, a number of the witnesses who testified at the evidentiary hearing were also deposed, and no party utilized any portion of those depositions at hearing to add relevant evidence to the record, to impeach a witness, or for any other purpose. The Commission can only assume that the parties understood the evidentiary ruling and chose not to offer the deposition testimony.¹⁶

No party filed a motion for clarification and no party filed a motion for reconsideration of the evidentiary ruling. Indeed, near the conclusion of the hearing, Public Counsel admitted on the record: “Then apparently I did misunderstand your ruling from last week.”¹⁷

Public Counsel also misstates and mischaracterizes Commission’s order when claiming the Commission concluded that the irrelevant anonymous letters would have contained only a small portion of relevant evidence. The Commission stated on page 25 of the Report and Order that even if it found that there was some minutia of relevant evidence buried in the incompetent evidence, that it would have been repetitive to hear it since the parties had a full and fair opportunity to present all relevant and competent evidence concerning the valid issues in this matter. Public Counsel attempts to tie this statement into its argument that the Commission was attempting to reform its evidentiary ruling post-hearing without allowing for responses.

The Commission relied on its ruling that the purported evidence in question involving the anonymous letters was wholly irrelevant.¹⁸ The Commission needs no further reason to support its ruling, although there are other grounds that support the ruling and upon which to affirm the ruling.¹⁹ For clarification, however, the Commission notes that in the pages referenced by Public Counsel,

¹⁶ The depositions may have focused solely on the anonymous allegations as opposed to any relevant information in relation to any relevant issue that may have been underlying those allegations, or simply the parties may not have elicited any competent relevant evidence. The Commission has no way of knowing since they were not offered into evidence.

¹⁷ Transcript, p. 3084.

¹⁸ The “Gifts and Gratuity” policy issue was addressed separately in the in Commission’s Report and Order.

¹⁹ The Commission notes that it is well-settled law that an appellate court will uphold evidentiary rulings if proper on any ground, even if not the ground asserted. *Foster v. Barnes-Jewish Hosp.*, 44 S.W.3d 432, 438 (Mo. App. 2001); *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 840 (Mo. App. 2005). The fundamental rules of evidence applicable to civil cases also are applicable in administrative hearings. *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003).

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the Commission was not attempting to make additional rulings with regard to the evidentiary ruling it made on April 24, 2008. The Commission was merely noting that there were additional grounds, beyond what the Commission earlier held, that supported the ruling. To the extent that any party misunderstood the passage in the Report and Order, the Commission so clarifies.

Additionally, Public Counsel seeks an explanation as to what the Commission meant by use of the term “undue delay.” While it is true the Commission referenced the “clock ticking” on the merger, the Commission was not referencing the time that would be consumed by the presentation of the irrelevant evidence as much as it was referring to the unnecessary proffering of irrelevant testimony that would have obstructed and hindered the quasi-judicial process – especially given the time that had elapsed for the parties to appropriately develop their cases in chief and articulate and support their positions in this matter.

Although Missouri courts frequently reference the evidentiary standard, the concept of “undue delay” or being “unduly long” is not well defined. It has not only been equated with the concept of there being inadequate time to spend on irrelevant evidence, but has also been equated simply to the offering of such evidence that lacks probative value as being purely a “waste of time.”²⁰

Specifically, the word “undue” is defined as “exceeding what is appropriate or normal, excessive; not just, proper or legal;”²¹ or as being “more than necessary; not proper; illegal.”²² The word “delay” is defined as “to postpone until a later time, defer; to cause to be later or slower than expected or desired;”²³ or “to retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder; or interpose obstacles.”²⁴

The Commission does not believe it is sound public policy to allow parties to engage in tactical legal manipulation of cases. In this instance, the Commission was referencing that to hear this irrelevant and incompetent evidence would hinder or obstruct the quasi-judicial

²⁰ *Govreau v. Nu-Way Concrete Forms, Inc.*, 73 S.W.3d 737, 742 -743 (Mo. App. 2002).

²¹ *The American Heritage College Dictionary*, 3rd Edition, Houghton Mifflin Company, 1997, p. 1473.

²² *Black’s Law Dictionary*, 6th Edition, West Publishing Co., 1990, p. 1528.

²³ *The American Heritage College Dictionary*, 3rd Edition, Houghton Mifflin Company, 1997, p. 366.

²⁴ *Black’s Law Dictionary*, 6th Edition, West Publishing Co., 1990, p. 425.

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process.²⁵

In paragraph 14 of its motion, Public Counsel takes exception with the witness credibility ruling the Commission made with regard to its witness, Mr. Dittmer. The Commission, as fact-finder, is appropriately allowed considerable deference with regard to its evidentiary and witness credibility rulings because it is in the best position to evaluate the composure, demeanor and presentation of witness testimony. The Commission's findings of fact are clear with regard to Mr. Dittmer; some of his testimony was credible, some was not, some of it was less credible in comparison to other expert testimony.²⁶ The Commission has comprehensively supported its findings of facts regarding witness testimony throughout the Report and Order.

In paragraph 15 of its motion, Public Counsel claims the Commission's approval of the merger is unlawful because it was not made by a majority of the Commission. Pursuant to Section 386.130, a majority of the Commissioners must be present to transact Commission business. A majority of five Commissioners is three Commissioners. Three Commissioners participated in this case, three Commissioners were present to conduct the Commission's business when the vote was taken on this case, and a majority of the Commissioners participating, i.e. two out of three, appropriately decided the matter. There is no legal error as Public Counsel alleges and no Missouri case so holds.

Philipp Transit Lines, Inc., referenced by Public Counsel, involved the use of a circulating notational voting system, as opposed to the Commission taking a public vote with a quorum present.²⁷ The closest a Missouri court has come to ruling on this specific issue was in *State ex rel. Centropolis Transfer Co. v. Public Service Commission*, 472 S.W.2d 24, 8 (Mo. App. 1971). In *Centropolis*, similar to

²⁵ The Commission further notes that legal relevance is determined by "weigh[ing] the probative value of the evidence against its costs," including unfair prejudice, confusion of the issues, undue delay, waste of time, or cumulativeness. *Shelton v. City of Springfield*, 130 S.W.3d 30, 37 (Mo. App. 2004). Thus, even logically relevant evidence can be excluded if its costs outweigh its benefits. Consequently, if evidence is erroneously admitted or excluded, an appellate court will reverse only if the error results in "substantial and obvious injustice." *Id.* "Where evidence is excluded, the issue is not whether the evidence was 'admissible,' it is whether the trial court abused its discretion in excluding it." *Govreau v. Nu-Way Concrete Forms, Inc.*, 73 S.W.3d 737, 742-743 (Mo. App. 2002).

²⁶ See Findings of Fact Numbers 21-101. See in particular Findings of Fact Numbers 101, 282, 294, 295, 299, 300, 301, 303, 306-308, 311-312, and 403-409.

²⁷ *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696, 700-701 (Mo. Banc 1977).

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this case, the Commission's report and order was approved by two commissioners, one commissioner dissented, and two did not participate. The court declined to reach the issue as to whether there was a majority vote or not.

As the Joint Applicants correctly noted in their response to the applications for rehearing:

Longstanding authority in both Missouri and in the federal courts holds that in the absence of a contrary statutory provision, a majority of a quorum -- that is, a simple majority of a quorum -- of an administrative agency is authorized to act for the body. *Federal Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179, 183-84, 189, 88 S. Ct. 401, 404, 407 (1967); *State ex rel. Kiel v. Riechmann*, 142 S.W. 304, 312 (Mo. 1911); *Hardesty v. City of Buffalo*, 155 S.W.3d 69, 74 (Mo. App. 2004). See 2 Am. Jur. 2d, Administrative Law § 82 (2004); General Counsel Opinion No. 97-1, Mo. P.S.C. (Feb. 18, 1997).

In paragraph 16 of its motion, Public Counsel claims the Commission erred for failing to grant its December 13, 2007 motion to dismiss this action. The Commission provided a full legal analysis of this issue in its "Order Denying Motion to Dismiss," issued on January 2, 2008.²⁸ The Commission has not changed its position on this issue. Moreover, the Commission did not adopt any particular standard as Public Counsel alleges, it applied the correct legal standard to the facts of this case.

In paragraph 17 of its motion, Public Counsel contends that the Commission erred by finding the "'public interest' necessarily must include the interests of both the ratepaying public and the investing public...."²⁹ In this instance, Public Counsel mischaracterizes the Commission's decision through selective quotation. The entire paragraph at issue in the Report and Order reads:

The public interest is a matter of policy to be determined by the Commission.³⁰ It is within the

²⁸ Further analysis regarding the appropriate application of the appearance of impropriety standard and the Judicial Canons may be found in "The Chairman's Report on a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statutes," Case No. AO-2008-0192, issued on January 15, 2008 (See pages 7-35).

²⁹ Report and Order, page 234.

³⁰ *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public

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discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.³¹ Determining what is in the interest of the public is a balancing process.³² In making such a determination, the total interests of the public served must be assessed.³³ This means that some of the public may suffer adverse consequences for the total public interest.³⁴ Individual rights are subservient to the rights of the public.³⁵ The “public interest” necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

The Commission is charged with the legal authority to determine what comprises the public interest and the Commission makes clear that determining the public interest is a balancing process considering the “total public interest.” Any individual interest, as stated clearly in the order, including interests held by the ratepaying public or the investing public, are subservient to the rights of the public in general.

Moreover, the Commission notes that the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property.³⁶

welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

³¹ *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

³² *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

³³ *Id.*

³⁴ *Id.*

³⁵ *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

³⁶ In *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393 (Mo. banc 1934), a case involving the sale of stock, and thus partial ownership, of two Missouri public utility corporations to a Virginia Corporation, the Missouri Supreme Court held: “The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to ownership of

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To the extent the Commission neglected to include this case citation, among the ones it already referenced in its Report and Order, the Order is so clarified.

In paragraph 18 of its motion, Public Counsel asserts that the Commission improperly shifted the burden of proof when finding “there is no conclusive, competent evidence that there would be either an upgrade or downgrade in the current credit ratings of Great Plains, KCPL, or Aquila in relation to approval of the proposed merger.” Again, Public Counsel mischaracterizes and misconstrues the Commission’s Report and Order.

The Commission concluded that the Joint Applicants met their burden to prove that the proposed merger was not detrimental to the public interest. The Commission applied the appropriate standard and provided a thorough analysis of the balancing test on pages 255-261 of the Report and Order. The Commission addressed the credit-worthiness issue in specific detail on pages 241-250 of the Order prior to applying the not detrimental to the public interest standard.

The not detrimental to the public interest standard does not require a party to demonstrate that there will be a benefit to a given transaction, it requires the applicants, in order to meet their burden of proof, to demonstrate that there will be no detriment to the public interest. As the Report and Order stated on pages 231 and 232:

A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

The Applicants met their burden with regard to this particular issue because they established that there was no competent evidence in the report that there would be any public detriment in relation to the

property. A property owner should be allowed to sell his property unless it would be detrimental to the public.” *Id.* at 400.

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companies' credit-worthiness. The Commission's conclusion that "there is no conclusive, competent evidence that there would be either an upgrade or downgrade in the current credit ratings of Great Plains, KCPL, or Aquila in relation to approval of the proposed merger," is merely a correct statement regarding the evidence in this case. The Commission did not require any party to demonstrate that there would be a downgrade in the credit ratings of the companies. The Commission merely concluded that there was no competent evidence in the record that demonstrated such.

The Applicants established that, with regard to the companies' credit ratings, there was no competent evidence to establish that there would be any direct or indirect effect of the transaction that tended to make the power supply less safe or less adequate, or that tended to make rates less just or less reasonable. The Applicants met their burden of proof. To the extent that the Report and Order was not clear on this point, it is so clarified.

The Commission further notes that even though the Applicants met their burden on this issue, the Commission still, out of an abundance of caution to protect the ratepayers, conditioned the order so that if any potential ill effects on the credit-worthiness of the companies did occur as a result of the merger, they would have to be borne by the shareholders and not the ratepayers. The Commission appropriately determined what the 'public interest' was, and what the public interest required, and made the investor's rights subservient to the rights of the public in general. Public Counsel objects to the Commission's authority to consider the interests of the investing public in Paragraph 17 of its application for rehearing, while it advocates, in its brief, that the Commission should consider the interests of the investing public and condition the merger to make their interests subservient if the Commission approved the merger.³⁷ The Commission acted, as it happens, in accordance with Public Counsel's request.

In paragraph 19 of its motion, Public Counsel asserts that the Commission failed to appropriately analyze the risk associated with a possible downgrade of the companies' credit worthiness that could occur if the merger was approved.³⁸ The Commission thoroughly

³⁷ *Initial Brief of the Office of the Public Counsel*, p. 22, filed June 2, 2008, EFIS Docket No. 440.

³⁸ When referencing witness Dittmer's testimony as part of its argument that the Commission failed to appropriately analyze the risk, Public Counsel makes the statement that: "If a downgrade occurs, the uncontroverted evidence is that a "death spiral" is possible."

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evaluated the evidence with regard to the effects the merger might possibly have on the credit-worthiness of the companies and reached the appropriate legal conclusions based upon the competent and substantial evidence on the record as a whole. As previously noted, the Commission conditioned approval of the merger so any risk of credit downgrade, even if not substantiated at hearing, would be borne by the shareholders of the companies – thus, protecting the ratepayers. The Report and Order, specifically the sections already referenced with regard to this issue, speaks for itself.³⁹

Finally, in paragraph 20 of its motion, Public Counsel claims the commission erred “in making its 285-page Report and Order effective only ten days after its issue date, allowing only six business days to evaluate it in the context of the entire record and prepare an application for rehearing.” Public Counsel’s assertions are simply incorrect. The order bore a ten-day effective date and the Commission extended that date by another three days.

The Commission discussed the upcoming order, the probable conditions that would be included in the order, the probable vote on the order and the length of the order at two separate, open public Agenda meetings prior to issuing the order.⁴⁰ Public Counsel was represented at these meetings.

Public Counsel’s complaint also seems to be partially based upon not desiring to be inconvenienced during the 4th of July Holiday weekend. The timing of the order was not intended to disrupt any persons’ or parties’ personal time. The order was issued following the Commission’s standard practice, a practice that has been sanctioned

However, stating that some piece of evidence is uncontroverted (which the Commission does not concede in this instance) is not the end of the inquiry. The Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.” *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949). The Commission’s credibility findings in relation to Mr. Dittmer’s testimony are fully delineated in the Report and Order.

³⁹ The Commission notes that despite all of the speculation without factual support made by various parties during this proceeding concerning the unsubstantiated potential of a credit downgrade, when the Applicants filed their Notice of Closing on July 18, 2008, they included the post-merger reports from the credit rating agencies. These reports demonstrate that no negative downgrade has occurred, and in fact demonstrate that the companies’ ratings either remained stable or improved. See *Notice of Closing*, filed on July 18, 2008, EFIS Docket No. 495.

⁴⁰ Agenda Meeting on June 12 and June 26, 2008.

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by the courts of Missouri.⁴¹

At any time following the issuing of the Report and Order on July 1, 2008, any party could have sought a stay from the Commission. Public Counsel did not file such a request. Only the Industrial Intervenors filed such a request and they filed it approximately 39 hours prior to when the order became effective. (The Commission will address that motion separately in a later part of this order.)

The Commission extended the time for filing motions for rehearing, yet Public Counsel's motion was filed two days prior to the expiration of the deadline. It is difficult for the Commission to comprehend Public Counsel's complaint that the ten day effective date, extended by an additional three days, was insufficient when Public Counsel requested no stay of the Order and did not utilize the entire extension of time granted by the Commission.

The Industrial Intervenors' Application for Rehearing

In paragraphs 1-3, 6-10 and 41-42 of its motion, the Industrials put forth several variations, and the application thereof, of the argument it raised during the pendency of these proceedings that the Commission erred in approving a merger that authorized an operational combination of Aquila, Inc. and KCPL. These arguments make specific claims regarding: the Commission's application of Section 393.190; the board of directors' approvals of the transaction; the proper pleading by the Joint Applicants to effectuate their requested relief; the need for a joint operating agreement; the partial variance granted from the Commission's affiliate transaction rule; and consideration of merger synergies. The Commission addressed these arguments in the conclusions of law section of the July 1 Report and Order.⁴²

In paragraphs 4 and 5 of its motion, the Industrials

⁴¹ Section 386.490.3 says an order of the PSC shall "become operative thirty days after the service thereof, except as otherwise provided." The Commission may fix a reasonable time in lieu of the said thirty day period and ten days has been determined to be reasonable. *State ex rel. Office of Public Counsel v. Public Service Com'n*, 236 S.W.3d 632, 636 (Mo. banc 2007) (Public Counsel argued ten days was reasonable); *State ex rel. Alton Railroad Co. v. Public Service Co.*, 348 Mo. 780, 155 S.W.2d 149, 154 (Mo. 1941); *State ex rel. Kansas City, Independence & Fairmount Stage Lines Co. v. Public Service Com'n*, 333 Mo. 544, 557, 63 S.W.2d 88, 93 (Mo. 1933). See also the "Joint Response of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc. in Opposition to Motion for Extension of Effective Date, filed July 8, 2008, EFIS Docket No. 487.

⁴² See pages 219-280. See also the respective findings of fact sections that relate to each specific conclusion of law section.

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apparently seek clarification of the Commission's use of terms when describing the merger. Paragraph 4 takes issue with the referenced customer count that Great Plains "serves through" KCPL, which the Commission believes is self-explanatory, and paragraph 5 objects to use of the terminology of "newly merged company." To the extent that the words "newly merged company" require clarification, the Commission points to its full description of the merger and the relationship described between the surviving entities appearing in the Report and Order.⁴³

In paragraphs 11 and 30 of its motion, the Industrials make vague allusions to the Commission ignoring bias on the part of Great Plains Energy's and KCPL's witnesses. However, these conclusory statements do not identify any specific alleged error. The Commission evaluated the witnesses' demeanor and credibility and made appropriate findings with regard to their testimony. Consequently, these allegations do not present a cognizable legal argument that could provide sufficient reason to grant a rehearing.

In paragraphs 12-22 and 45 of its motion, the Industrials take issue with the Commission's April 24, 2008 evidentiary ruling. In several of these paragraphs the Industrials misconstrue the evidentiary ruling. In others, they simply fail to state a cogent legal argument as they provide no specifics for any alleged error. The Commission has already addressed these arguments.⁴⁴

In paragraphs 27, 28, 33, 35, and 36 of its motion, the Industrials take issue with the Commission's weight and credibility rulings with regard to Staff's testimony and the Report Staff attached to its testimony. These arguments claim the Commission erred for: (1) directing its Staff to use the Report format; (2) placing extreme importance and credibility findings upon the prior appearance of a witness (not identified by the Industrials) in the proceeding; (3) failure to hold the Joint Applicants' evidence to the same standard as it holds its own Staff's evidence; and, (4) evaluating Staff Witness Schallenberg's expertise.

There is nothing in the record of this case to establish that the Commission may have recommended a Report format to its Staff for presenting certain evidence. Assuming it did, however, the Commission certainly did not instruct its Staff to submit a legally deficient report, nor did it instruct its Staff to proffer an insufficient number of

⁴³ Findings of Fact 121-163.

⁴⁴ See the Transcript, pp. 2074-2120, the Report and Order, pp. 14-30, and the Commission's responses to Public Counsel's Paragraphs 2-13.

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subject matter experts to defend the content of its Report. With regard to the referenced “prior witness,” the Industrials fail to identify any specific witness, witness testimony, or credibility findings that the Commission is alleged to have made in error and consequently this conclusory argument does not present a cognizable legal argument that could provide sufficient reason to grant a rehearing. Moreover, to the extent that the Commission relied on any particular witness’ testimony for any particular issue in this matter, the Commission’s reasoning is supported in its Report and Order.

The Commission’s witness credibility findings are supported in the record and were based, in part, upon the parties’ examination of the witnesses. The Industrials claim the Commission failed to attack the credibility of certain witnesses, but apparently forget that they were litigants in this matter and had full opportunity to cross-examine the witnesses and challenge their credibility and expertise.

No witness is required to be an expert in all specialties, but the Commission would expect a witness to be an expert in the areas in which he or she is proffered to testify as an expert. In making the findings regarding Witness Schallenberg’s expertise, the Commission merely relied upon Mr. Schallenberg’s on-the-record admissions. Mr. Schallenberg was Staff’s only witness and claimed to be responsible for the Staff’s Report – composed by, as testified to by Mr. Schallenberg, a mixture of subject matter experts in subject areas in which Mr. Schallenberg admittedly had no expertise. The findings are clear in this regard and the Commission cites to the relevant testimony provided by Mr. Schallenberg to support its findings in the Report and Order.

In paragraphs 29, 37-39 of its motion, the Industrials take exception with the Commission’s findings with regard to the evidence concerning the companies’ creditworthiness. The Industrials specifically contend the Commission erred when: (1) making its witness credibility findings on witnesses testifying on credit-worthiness; (2) not automatically deferring to its Staff’s position on this evidence; (3) relying upon hearsay (that the Industrials fail to identify); and (4) using descriptive terms with regard to the evidence presented.

The Commission notes that the well settled Missouri Law holds that not only does the qualification of a witness as an expert rest within the fact-finder’s discretion,⁴⁵ but witness credibility is solely a

⁴⁵ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder

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matter for the fact-finder “which is free to believe none, part, or all of the testimony.”⁴⁶ An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.⁴⁷ With regard to the specific assertion that the Commission must always defer to its Staff, the Commission addressed this argument in Footnote Number 400 on pages 110 and 111 of the Report and Order.

The Commission relied on substantial and credible evidence in the record as a whole to support its conclusions of law in relation to this evidence and the Industrials do not identify any specific “hearsay evidence from persons not in attendance and which could not be produced as witnesses by KCPL,” nor is it apparent that the Industrials lodged any appropriate objections to any of this alleged hearsay evidence. Hearsay testimony may be considered if no objection is made.⁴⁸ Without further specifics, the Industrials do not even present a cognizable legal argument that could provide sufficient reason to grant a rehearing.

The Commission made appropriate findings and conclusions concerning the credit-worthiness evidence that are supported by competent and substantial evidence on the record as a whole.⁴⁹ Moreover, the Commission conditioned approval of the merger so that if any credit downgrade occurred in relation to the merger, the

looks to whether he or she possesses a “peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience.” *Id.* In *State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

⁴⁶ *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

⁴⁷ *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com’n of the State of Mo.*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users’ Ass’n. v. Public Service Com’n of the State of Mo.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Com’n*, 703 S.W.2d 577 (Mo. App. 1986).

⁴⁸ *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 842 (Mo. App. 2004).

⁴⁹ See Report and Order, pp. 128-157, 241-250, and 255-262.

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shareholders would have to bear those effects as opposed to the ratepayers.

In paragraphs 31, 32, and 34 of its motion, the Industrials again attack the credibility rulings of the Commission with regard to Great Plains Energy's and KCPL's witnesses. The Industrials point to what they allege are inconsistencies in testimony and specifically focus on the testimony of Mr. Cline in regard to certain schedules included with his pre-filed testimony.

The Industrials apparently fail to understand the difference between the witnesses updating their testimony, taking into account the changes they made in their merger proposal and the compensatory modifications they made to what were described as key and necessary elements of those respective proposals, and true inconsistencies where witnesses make contradictory statements in conjunction with the same subject matter thereby diminishing their credibility. Indeed, several witnesses in this case failed to update or revise their testimony when the proposed merger plan changed, and as the Commission found, this failure, and the inability of these witnesses to present a full analysis of the revised plan, damaged their credibility.

With regard to the specific testimony witness Cline, the Commission addressed this issue in Footnote 565, on page 146 of the Report and Order. The Industrials fail to consider the purpose for certain evidence and corroborating evidence. The Industrials also fail to address the interplay between the topics of various testimony and the overall comparative value of that subject-specific testimony as it is utilized to render conclusions of law.

The Industrials, in their attempt to contrast witness Schallenberg's testimony with that of Mr. Cline's, also fail to acknowledge the issue of the quality of any particular witness' answers to questions. As the Commission appropriately found in Finding Number 101:

Additionally, the Commission finds that regardless of the general credibility findings made in Findings of Facts Numbers 21 through 100, a given witness's qualifications and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make

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additional specific weight and credibility decisions
throughout this order as to specific items of testimony.⁵⁰

Answering all questions does not mean they were answered well or completely, or that a different witness' testimony was not superior and, consequently, given more weight.

In paragraphs 23, 24, 25, 40, 43, 44, 46 and 51 of its motion, the Industrials raise arguments that were also raised by Public Counsel involving LaCygne, alleged burden shifting, alleged insufficient participation by the Commissioners, Public Counsel's December 13, 2007 motion to dismiss this action and the effective date of the Report and Order. The Commission has already addressed these arguments in its Report and Order and/or in this order.⁵¹

In paragraph 26 of its motion, the Industrials argue the Commission erred for not making a decision regarding a nonexistent "Additional Amortization" plan that was not submitted as part of this case. The Commission addressed this argument in its Report and Order.⁵² The Commission also preserved in the record an offer of proof regarding the so-called issue about "Additional Amortizations." No party moved the Commission to reconsider its ruling regarding the Additional Amortization following the offer of proof.

In paragraphs 47, 48, 49 and 50 of its motion, the Industrials claim the Commission misidentified the public interest and applied the wrong standard for approving the merger application. The Commission appropriately analyzed what constitutes the public interest and applied the correct standard.⁵³

In paragraph 52 of its motion, the Industrials "incorporate by reference as though fully set forth herein the provisions and issues that are identified by the Office of Public Counsel in its Application to Intervene [sic]." The Commission assumes the Industrial Intervenors

⁵⁰ As previously stated: witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *In re C. W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

⁵¹ The Commission notes that the Industrials filed their Motion for Rehearing at 8:30 a.m. on July 12th, (39 1/2 hours prior to the deadline).

⁵² See pages 26-29, 48-49, 154-155, and 247-248.

⁵³ See the conclusions of law section of the Report and Order.

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were referring to Public Counsel's Application for Rehearing, since Public Counsel did not file an application to intervene. Recognizing the settled law that the technical rules of pleading are not applicable to applications or pleadings filed with the Commission,⁵⁴ and that such pleadings are to be liberally construed,⁵⁵ the Commission recognizes the Industrials were attempting to incorporate, by reference, those issues identified in Public Counsel's Application for Rehearing. In response, the Commission directs the parties to the Commission's responses to the Public Counsel's arguments, *supra*.

The South Harper Residents' Application for Rehearing

Shirley and Allen Bockelman, members of the South Harper Residents, also filed a motion for rehearing in this matter; however, their four arguments⁵⁶ were already addressed by the Commission when responding to the arguments made by Public Counsel and the Industrials.

Conclusion and the Industrial Intervenors Motion to Stay

Section 386.500 provides that the Commission shall grant a rehearing "if in its judgment sufficient reason therefor be made to appear." The Commission finds no sufficient reason in the motions for rehearing filed by Public Counsel, the Industrial Intervenors or the Bockelman's to grant rehearing and consequently, the motions shall be denied. Because, there was no reason to expeditiously rule on the Industrial's motions for rehearing and to stay the Commission's Report and Order, Commission shall overrule the Industrials' requests to expedite and stay the Order as being moot.

IT IS ORDERED THAT:

1. The points of clarification delineated in the body of this order that relate to the Report and Order issued in this matter on July 1, 2008, are hereby adopted.

⁵⁴ *State ex rel. Crown Coach Co. v. Public Service Com'n*, 179 S.W.2d 123, 126 (Mo. App. 1944). See also *State ex rel. M., K. & T. R. Co. v. Public Service Com'n*, 210 S.W. 386 (Mo. 1919); *State ex rel. Kansas City Terminal R. Co. v. Public Service Com'n*, 272 S.W. 957 (Mo. 1925).

⁵⁵ *Id.* See also Section 386.610.

⁵⁶ The four arguments claimed the Commission erred by: (1) approving a business and operational combination between Aquila and KCPL; (2) refusing to apply the burden of proof upon the joint applicants to show that the proposed transaction would be "not detrimental" to the public interest, and instead placing the burden of proof on other parties; (3) issuing a Report and Order that was approved by less than a majority of the five Public Service Commissioners; and, (4) denying the Public Counsel's Motion to Dismiss, filed on December 13, 2007.

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2. The Application for Rehearing filed by the Office of the Public Counsel on July 11, 2008, is denied.

3. The Application for Rehearing filed by the Sedalia Industrial Energy Users' Association, AG Processing, Inc. and Praxair, Inc. (the Industrial Intervenors) on July 12, 2008, is denied.

4. The Application for Rehearing filed by Shirley and Allen Bockelman on July 13, 2008, is denied.

5. The Industrial Intervenors' Motion for Stay of Report and Order of July 1, 2008, and Request for Expedited Consideration of Motion for Stay, filed on July 12, 2008, are both overruled as being moot.

6. This order shall be effective on August 6, 2008.

7. This case shall be closed on August 7, 2008.

Murray and Jarrett, CC., concur; Clayton, C., dissent;
Davis, Chm., and Gunn, C., absent.
Stearley, Regulatory Law Judge

In the Matter of the Name Change Request from Aquila, Inc., d/b/a Aquila Networks – L&P, and Aquila, Inc., d/b/a Aquila Networks – MPS, to Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company.

*Case No. EN-2009-0015
Decided August 7, 2008*

Electric §1. The Commission recognized the name change since the Commission had the opportunity to render a decision on the motions for rehearing regarding the merger. Thus there was no indication or evidence that recognizing the proposed name change would be against the public interest.

ORDER RECOGNIZING NAME CHANGE AND APPROVING TARIFFS

On July 2, 2008, Aquila, Inc., d/b/a Aquila Networks – L&P and Aquila, Inc. d/b/a Aquila Networks – MPS (hereafter “Aquila”) and Great Plains Energy Incorporated (hereafter “GPE”) requested the Commission to recognize Aquila’s name change to Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company. With its application, the applicants filed tariff sheets evidencing such a name change that bear an effective date

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of August 1, 2008. However, Aquila and GPE also filed a Motion for Expedited Treatment, asking the Commission to approve the tariffs effective July 14, 2008, which would coincide with the closing date of the transactions authorized in Commission Case No. EM-2007-0374.

On July 8, the Office of the Public Counsel (hereafter “Public Counsel”) responded. It stated that it did not object to the name change itself. Nevertheless, Public Counsel suggested that the Commission should time its decision to coincide with its decision on whether to extend the effective date of its Report and Order in Case No. EM-2007-0374. Further, Public Counsel stated that the applicants have failed to file evidence of the registration of the fictitious name with the Missouri Secretary of State, as required by Commission rule.

Staff also responded on July 8, recommending that the Commission approve the name change subsequent to Aquila and GPE’s timely filing of the registration of the fictitious name with the Missouri Secretary of State. On July 9, the Commission denied the Motion for Expedited Treatment on the grounds that Aquila and GPE had failed to comply with Commission Rule 4 CSR 240-2.060(5)(B), in that they failed to submit “(e)vidence of registration of the name change with the Missouri secretary of state.”

On July 15, in an effort to comply with the above rule, Aquila and GPE filed a Late-Filed Exhibit Concerning Application for Change of Name and Motion for Expedited Treatment to Effectuate That Change. The late-filed exhibit was evidence of registration of the fictitious name with the Missouri Secretary of State.

After its July 15 filing, Aquila and GPE asked the Commission to make the name change effective July 18. They believed their customers would benefit by having less confusion if the name change occurs as soon as possible after the closing of the transactions the Commission approved in Case No. EM-2007-0374. Aquila and GPE state that it will be confusing for Aquila customers to know that GPE has acquired Aquila, but for them to still receive bills and correspondence bearing the name Aquila, as if the transaction had not occurred.

As permitted by the Commission, Public Counsel responded on July 16. Public Counsel stated that it did not oppose the name change itself, but opposes the timing, believing that it is premature for the Commission to approve the name change before the Commission rules on motions for rehearing in Case No. EM-2007-0374. As allowed by the Commission, Staff filed no reply to Aquila’s and GPE’s July 15 application, and relied on its July 9 recommendation for the Commission

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to approve the application. The Commission took up the Applicants' request at its regularly scheduled Agenda meeting on July 17, but declined to grant expedited approval of the tariff to allow sufficient time to examine the Applicants' proposed name change and tariff sheets. On July 30, the Commission suspended the tariff until August 8 in order to complete its examination of the motions for rehearing filed in Case No. EM-2007-0374.

The Commission has now had adequate time to fully review the application, Staff's recommendation, and Public Counsel's pleadings, and to consider and render a decision on the pending motions for rehearing in Case No. EM-2007-0374. A corporation has the legal right to register and operate under the name of its choosing so long as it complies with all pertinent statutory and regulatory mandates. The Commission finds that Aquila and GPE have complied with Commission Rule 4 CSR 240-2.060(5)(B). There is no indication or evidence that recognizing the proposed name change would in any way be against the public interest. The name change shall be recognized and the proposed tariffs shall be approved. The Commission shall approve the tariffs to become effective on August 8, 2008.

IT IS ORDERED THAT:

1. The Commission recognizes the name change of Aquila, Inc., d/b/a Aquila Networks – L&P and Aquila, Inc. d/b/a Aquila Networks – MPS to Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company.

2. Tariff No. JE-2009-0013, (Electric), filed on July 2, 2008, and suspended until August 8, 2008, is approved for service on and after August 8, 2008. The tariff sheet approved is:

P.S.C. MO. No. 1

Original Title Page, Original Sheet 0.1

3. Tariff No. YH-2009-0014, (Steam), filed on July 2, 2008, and suspended until August 8, 2008, is approved for service on and after August 8, 2008. The tariff sheet approved is:

P.S.C. MO. No. 1

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4. This order shall become effective on August 8, 2008 at 12:01 a.m.
5. This case shall be closed on August 9, 2008.

Murray, Clayton, Jarrett, and Gunn, CC., concur.
Davis, Chm., absent.

Pridgin, Senior Regulatory Law Judge

**Guy Thomas, Complainant, v. Evergreen Lakes Water Supply,
Respondent**

*Case No. WC-2008-0248
Decided: August 12, 2008*

Water §1. The Commission entered default judgment in favor of Guy Thomas because the respondent's response did not state good cause to set aside the default judgment.

ORDER GRANTING RELIEF BY DEFAULT

Background and Procedural History

Guy Thomas filed a formal complaint against Respondent Evergreen Lake Water Company ("Evergreen") on January 29, 2008. In his complaint, Mr. Thomas alleged that although the applicable "tap-on" fee set forth in Evergreen's tariff at the time he requested the connection for his residence was \$75, Evergreen later charged him \$800, deliberately waiting until a revised tariff raising the fee from \$75 to \$800 went into effect. He also alleged that after his tap-on connection was completed by Evergreen, he had his yard graded and found that his lot already had an unused meter setting that could simply have had a meter added to it, eliminating the need to install another one. Finally, Mr. Thomas averred that although he had asked Evergreen to fix two open pipes located in his yard, which was frequented by children and dogs, Evergreen had done nothing to fix them.

On February 7, 2008, the Commission notified Evergreen of the complaint and allowed it thirty days in which to answer as provided by 4 CSR 240-2.070(7). The same day, pursuant to 4 CSR 240-2.070(10), the Commission ordered its Staff to commence an investigation of Mr. Thomas'

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formal complaint and to file a report concerning the results of its investigation no later than one week after Evergreen filed its answer to the complaint. Evergreen did not file an answer, even though such a pleading was due by no later than March 10, 2008.

The Commission's Order of Default

On March 27, 2008, the Commission issued an Order Directing Filing, in which Evergreen was ordered to file, by no later than April 3, 2008, a pleading showing good cause why the Commission should not deem Mr. Thomas' averments to have been admitted and enter an order granting default pursuant to Commission Rule 4 CSR 240- 2.070(9). Evergreen did not file such a pleading. Accordingly, by order dated April 10, 2008, the Commission found Evergreen in default and informed the company that Mr. Thomas' averments were deemed to have been admitted by Evergreen.

The averments deemed to be admitted by Evergreen include:

- 1) The price of the tap-on fee at the time it was requested was \$75.00.
- 2) The applicable tariffed rate at the time the tap-on was requested was \$75.00.
- 3) Delay by Evergreen resulted in a tap-on being installed after the company had increased its tariffed rate for a tap-on installation to \$800.00.
- 4) Mr. Thomas filed a timely informal complaint with the Commission and believed that he was unable to proceed to the formal complaint process based upon his understanding of what the Commission's consumer services division had represented to him.
- 5) Mr. Thomas was unaware of his ability to utilize the formal compliant process until his brother had succeeded with prosecuting a similar complaint with the Commission.
- 6) Once the tap-on was installed, Mr. Thomas discovered that he had a usable water meter pit already in place on his property that Evergreen failed to inform him about.
- 7) The delayed, and unnecessary, installation of Mr. Thomas's tap-on would not have occurred had Mr. Thomas been properly informed of the existing tap-on.

In the Commission's April 10 Order Granting Default, again pursuant to 4 CSR 240-2.070(9), the Commission gave Evergreen until April 28, 2008 to move the Commission to set aside the order of default,

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explaining that any such motion had to be supported by a showing of good cause for Evergreen's failure to timely answer. Evergreen did not file such a motion;¹ however, a letter, dated April 28, 2008, was apparently mailed by Evergreen to the General Counsel's Office requesting that the order of default be set aside.

It is unclear from Staff's recommendation when it received Evergreen's letter, and Staff apparently had the Commission's Data Center file the letter in this docket on May 9. This letter, however, does not satisfy the requirements for motion to set aside the default order for several reasons. Evergreen is a corporation and must be represented by counsel authorized to practice law in Missouri.² The letter mailed to Staff is signed by Eunice Jones, either an owner or employee of Evergreen. It is not a proper pleading filed by a proper legal representative for the company. The letter is not a sworn or verified document and it, and its contents, do not constitute evidence. Moreover, even if the Commission treated the letter as having veracity, the letter fails to state good cause to set aside the default.

Although the term "good cause" is frequently used in the law,³ the rule does not define it. Therefore, it is appropriate to resort to the dictionary

¹ Evergreen was notified that failure to state good cause to set aside the default would result with the Commission proceeding to "find as facts the allegations in Mr. Thomas' complaint and . . . grant him the relief, if any, to which he is entitled on those facts under the governing law."

² Commission Rule 4 CSR 240.2.010(13) includes in its definition of a pleading "any . . . , complaint, . . . which is not a tariff or correspondence, and which is filed in a case." All pleadings are governed by 4 CSR 240-2.080, and all pleadings not in substantial compliance with 4 CSR 240-2.080, applicable statutes or commission orders "shall not be accepted for filing." Pleadings filed with the Commission require the signature of an attorney authorized to practice law in Missouri, unless the entity signing the pleading is a natural person representing only that natural person, i.e. themselves. (4 CSR 240-2.080(1) and (6)). The lack of the proper signature is the equivalent of the application bearing no signature, and unsigned pleadings shall be rejected. (4 CSR 240-2.080(5)). Moreover, 4 CSR 240-2.040(5), specifically addressing practice before the Commission, states: "A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural person on his or her own behalf and shall not be made for any other person or entity." The underlying basis for these Commission Rules can be found in RSMo sections 484.010 and 484.020, RSMo 2000. Section 484.010 defines the practice of law as "the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies." Section 484.020 restricts the practice of law and engagement in law business to licensed attorneys.

³ *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

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to determine its ordinary meaning.⁴ Good cause “generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.”⁵ Similarly, “good cause” has also been judicially defined as a “substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.”⁶

Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given “must be real not imaginary, substantial not trifling, and reasonable not whimsical.”⁷ And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.⁸

Evergreen’s April 28 letter provides the Commission only with conclusory statements. The letter alleges that Mr. Thomas requested the tap-on be set after a loan was approved and Evergreen was unaware of the already installed “pit.” The letter also does not provide any support for the proposition that the request/application for the tap-on had not been completed prior to the change in tariffed rates. Consequently, the Commission finds that Evergreen has failed to state good cause for setting aside the order of default.

Staff’s Recommendation

The Commission issued an Order Directing Filing on April 29, 2008, in which it directed Staff to file, by May 9, 2008, a pleading concerning what relief, if any, the complainant (Mr. Thomas) was entitled to under the governing law. On May 9, Staff timely filed its “Recommendation Regarding the Relief the Commission May Grant,” which contained a verified report containing the results of its investigation into Mr. Thomas’ complaint. In its report, Staff concluded from its investigation that:

Mr. Thomas should pay the \$75 tap fee for his

⁴ See *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term “good cause” as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5 (same).

⁵ *Black’s Law Dictionary* 692 (6th ed. 1990).

⁶ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective “ordinary person” standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm’n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”)

⁷ *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

⁸ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

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residence. There are two reasons for Staff's recommendation. First, Mr. Thomas requested the tap before the \$800 rate went into effect. Second, a meter setting had already been installed on the property during the time the tap fee was \$75, and this setting could have been used.

The Company should put a lid on the valve box that is open. The box that is sticking out of the ground should be lowered to grade and it should have a lid installed on it. This assumes that these are, in fact, active valve locations. If they are not active valve locations, then the inactive valve boxes should be removed or buried completely.

I (Steve Loethen, Utility Operations Technical Specialist) also recommend that the Company dig up the unused meter setting and cap the service line at the main. A meter horn without a meter in it is a possible source of contamination and the meter setting can also be reused at another time to save the Company money.

Findings of Fact

The Commission finds as facts the seven averments deemed admitted by Evergreen already delineated in this order. Additionally, based upon the pleadings filed by the parties, the Commission finds: (8) Mr. Thomas did not complete a written, formal application for service with Evergreen; (9) Mr. Thomas has two meter settings in his yard (one used, and the other unused), the latter of which presents a possible source of contamination; and (10) there are two open valve boxes (one at grade, the other sticking approximately eight inches out of the ground) in Mr. Thomas' yard. The Commission further notes that it is not clear from the pleadings as to whether Mr. Thomas has in fact paid the tap-on fee.

Conclusions of Law

Applicable State Statutes

Under Section 393.270, RSMo 2000, the Commission can make factual determinations as to what the applicable connection fee is at the time that a connection is made.⁹ Further, "...An investigation may be instituted by the commission as to any matter of which complaint may be made as provided in sections 393.110 to 393.285, or to enable it to ascertain the facts requisite to the exercise of any power conferred

⁹ Section 393.270.1, RSMo 2000.

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upon it.”¹⁰ Pursuant to Sections 393.270.2 and 393.140(2), RSMo 2000, it can also order a company to make improvements to its system for the purpose of safety. There is no question of the Commission’s authority to ensure that Evergreen provides safe and adequate service.¹¹

Pertinent Portions of Evergreen’s Tariff

SCHEDULE OF RATES:¹²

Availability:

The following rates are applicable to all customers adjacent to the company’s distribution mains using standard water services:

Rate Schedule:

Residential:			
Customer Charge	5/8"	\$ 7.71	+
	1"	\$18.38	+
Commodity Charge		\$2.054 per 1,000 gal.	+
Commercial:			
Customer Charge	5/8"	\$ 7.71	+
	1 1/2"	\$83.15	+
Commodity Charge		\$2.054 per 1,000 gal.	+
These rates are exclusive of any gross receipts or franchise taxes.			

Late Charges:

Billings will be made and distributed at monthly intervals. Bills will be rendered net, bearing the last date on which payment will then be considered delinquent. The period after which payment will then be considered delinquent is 21 days after rendition of the bill. A charge of \$5.00 or three percent (3%) per month times the unpaid balance, whichever is more, will be added to delinquent amounts.

Status of Rates: The rates set forth in the above rate schedules are interim and subject to reduction pending the Company’s compliance with the Report and Order issued by the Public Service Commission in Case Number WR-2006-0131.

¹⁰ *Id.*

¹¹ See Chapters 386 and 393, RSMo 2000.

¹² See Evergreen Lake Water Company Tariff P.S.C. MO. No 2, 2nd Revised Sheet No. 4 and Original Sheet No. 4A, tracking numbers JW-2002-0115 and JW-2006-0233. See also Case No. WR-2006-0131. This schedule of rates became effective October 27, 2005 and is still in effect. An “*” indicates a new rate or text and a “Y” indicates a changed rate or text.

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Returned Check Charge

A returned check charge of \$20 per check will be paid on all checks returned from the bank for insufficient funds.

Service Charges

Turn-off/Reconnection Charge (see Rule 7)	\$ 20.00	+
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Tap-on Fee

Tap-on fee for meter sizes indicated below:

5/8"	\$800.00	+
1"	\$815.00	+
1 1/2"	\$825.00	+
2" single registered	\$850.00	+
2" compound	\$900.00	+
Over 2" Net Cost Plus	\$ 20.00	

Rule 1 - DEFINITIONS:¹³

(f) A "SERVICE CONNECTION" is the pipeline connecting the main to the customer's water service line at the property line, or outdoor meter setting including all necessary appurtenances.

(g) The "DATE OF CONNECTION" shall be the date of the permit for installation and connection issued by the Company. In the event no permit is taken and a connection is made, the date of connection may be the date of commencement of construction of the building upon the property.

(h) The "METER SETTING" includes the meter box, meter yoke, meter, and appurtenances, all of which shall be owned and maintained by the Company.

Rule 2 – GENERAL¹⁴

(a) Every water customer, upon signing an application for any water service rendered by the Company, or upon taking of water service, shall be considered to have expressed consent to be bound by these rates, rules and regulations.

(b) The Company's rules and regulations governing rendering of service are set forth in these numbered sheets. The rates

¹³ Effective since May 15, 1987, without change.

¹⁴ *Id.*

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applicable to appropriate water service or rate determination areas are set forth in rate schedules and constitute a part of these rules and regulations.

(c) The Company reserves the right, subject to authority of the Public Service Commission of Missouri, to prescribe additional rates, rules or regulations or to alter existing rates, rules or regulations as it may from time to time deem necessary and proper.

(d) At the effective date of these rules and regulations, all new and existing facilities, construction contracts, and written agreements shall conform to these rules and regulations in accordance with the Statutes of the State of Missouri and authority of the Public Service Commission of Missouri.

Rule 4 - APPLICATIONS FOR SERVICE¹⁵

(a) A written application for service, signed by the customer, stating the type of service required and accompanied by any other pertinent information, will be required from each customer before service is provided to any unit. Every customer, upon signing an application for any service rendered by the Company, or upon taking, of service, shall be considered to have expressed consent to the Company's rates, rules and regulations.

(b) The applicant for original introduction of water service into premises will be required to pay the tap-on fee for the connection. The tap-on fee will be deposited in full at the water company's office before the tap on and connection will be made.

Rule 11 – METERS AND METER INSTALLATIONS¹⁶

(a) All permanent service connections shall be metered. The Company's installed meter shall be the standard for measuring water used to determine the bill.

(b) All meters and meter installations shall be furnished, installed, maintained and removed by the Company and shall remain its property.

(c) The Company shall have the right to determine on the basis of the Customer's state flow requirements the type and size of meter to be installed and location of same. If flow requirements increase or decrease subsequent to installation and a larger or smaller meter is requested by the Customer, the cost of installing such meter shall be paid by the Customer.

¹⁵ *Id.*

¹⁶ *Id.*

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(d) Service to any one Customer shall be furnished through a single metering installation. Where a building is occupied by more than one tenant, the building shall be served by one meter. The Customer may rearrange piping at his own expense so as to separate the units and meter his tenants as he chooses, then divide the bill accordingly.

(e) The meters and meter installations furnished by the Company shall remain its property, and the owners of premises wherein they are located shall be held responsible for their safekeeping and carelessness of said owner, his agent, or tenant. For failure to protect same against damage, the Company may refuse to supply water until the Company is paid for such damage. The amount of the charge shall be the cost of the necessary replacement parts and the labor cost necessary to make the repair.

(f) Meters will be installed at or near the Customer's property line; it shall be placed in a meter box vault constructed by the Company in accordance with its specifications. Company shall furnish and install suitable metering equipment for each Customer except where installation in a special setting is necessary, in which case the excess cost of installation shall be paid by the Customer.

(g) The Customer shall promptly notify the Company of any defect in, or damage to, the Meter Setting.

(h) Any change in the location of any existing meter or Meter Setting at the request of the Customer shall be made at the expense of the Customer, and with the approval of the Company.

(i) If an existing basement meter location is determined inadequate or inaccessible by the Company, the Customer must provide for the installation of a meter to be located at or near the Customer's property line. The Customer shall obtain from the Company, or furnish the necessary meter installation appurtenances conforming to the Company's specifications, and said appurtenances and labor shall be paid for by the Customer.

(j) Approved meter installation locations in dry basements, sufficiently heated to keep the meter from freezing, may remain provided the meter is readily accessible, at the Company's and Customer's convenience as determined by the Company for servicing and reading and the meter space provided is located where the service line enters the building. The Company may, at its discretion, require the Customer to install a remote reading device at an approved location, for the purpose of reading the meter. It is the responsibility of the Customer and/or the owner of the premises to provide a location for the water meter which, in the event of water discharge as a result of leakage from the meter or couplings, will not

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result in damage. The Water Company's liability for damages to any and all property caused by such leakage shall in no event exceed the price of water service to the affected premises for one average billing period in the preceding year. Where damage is not caused by the negligence of Company personnel at the premises, this limitation will not apply. If a customer refuses to provide an accessible location for a meter as determined by the Company, the Company will notify the Secretary of the Public Service Commission before ultimately refusing service or proceeding to discontinue service.

Filed Tariff Doctrine

A tariff is a document which lists a public utility's services and the rates for those services.¹⁷ A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature.¹⁸

The filed tariff, or filed rate, doctrine governs a utility's relationship with its customers and provides that any rate filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action.¹⁹ The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of the published tariffs.²⁰ "[N]either the customer's ignorance nor the utility's misquotation of the applicable tariff provides refuge from the terms of the tariff."²¹

Further, "a customer of a utility has no cause of action against a utility for alleged negligent or intentional misquotation of a tariffed service."²² Courts that have considered the fraud issue almost unanimously have rejected the notion that there is a fraud exception to the filed rate doctrine.²³ The rationale behind applying the filed tariff doctrine when there are allegations of fraud is to prevent "discrimination in rates paid by consumers because victorious plaintiffs would wind up paying less than non-suing ratepayers."²⁴

There is no rate/service distinction under the filed tariff doctrine. *Id.*

¹⁷ *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997).

¹⁸ *Id.* See also *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996). When analyzing a tariff, if the tariff is clear and unambiguous, the court cannot give it another meaning. *Id.*

¹⁹ *Id.* See also *Metro-Link Telecom*, 919 S.W.2d at 692.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* See also *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir.1994).

²⁴ *Id.*

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The filed tariff doctrine prohibits discrimination based on service as well as price.²⁵ Once a filed tariff is approved, it becomes law and is an absolute defense.²⁶

Decision

Evergreen's tariff provisions make clear that once a customer completes an application and pays the applicable tap-on fee, and once the date of connection is established when either Evergreen issues a permit or begins construction, that the tarified rate for installation of the tap-on becomes fixed upon that date of connection.²⁷ As best as the Commission can determine, Mr. Thomas intended to apply for service and the tap-on installation at the time the tariff fee was \$75. However, there is no evidence that a permit was issued by Evergreen and the actual date of connection must have been established on the date in which construction began; i.e. some time after the tarified rate increased to \$800.²⁸ Consequently, it would appear that the filed tariff doctrine would determine the applicable tap-on fee to be \$800 at the time Evergreen installed the unnecessary tap-on. However, the fact that the second tap-on installed by Evergreen was unnecessary is the crux of this case, and the filed tariff doctrine is not implicated or relevant to the Commission's decision.

The only service that Mr. Thomas should have initially received at the time he made his request for service from Evergreen was the installation of the water meter with a connection made to his service line. The Commission's rules are clear that bills for residential utility services may only include charges authorized in the company's Commission-approved tariff.²⁹ Charges for unnecessary services are not authorized by the Commission in Evergreen's Commission-approved tariff.

Mr. Thomas should not be required to pay for Evergreen's failure to acknowledge the existence of and utilize its own infrastructure; i.e. the

²⁵ *Id.*

²⁶ *Snelling v. Southwestern Bell Telephone Co.*, 996 S.W.2d 601, 604 (Mo. App. 1999).

²⁷ See also Order Granting Relief and Denying Motion to Set Aside Default, *Erik M. Thomas v. Evergreen Lake Water Company*, Case No. WC-2006-0423 (Aug. 31, 2006), at 2. At first blush, the complaint in Case No. WC-2006-0423, involving the complainant's brother, appears very similar to this one. However, the two cases are factually distinguishable.

²⁸ The Commission could derive an inference from this case and Case No. WC-2006-0423 that Evergreen has been waiving its formal application requirements; however, that inference does not add to the legal analysis in this instance.

²⁹ See Chapter 13 of the Commission's rules.

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tap-on already installed on Mr. Thomas's property.³⁰ Evergreen's tariff provides for no connection fee for attaching the meter to a customer's service line and the tariff also provides for no fee for the installation of the meter itself. Consequently, Mr. Thomas should not have received any charges whatsoever in relation to the installation of a tap-on when his water service was first connected.

It is irrelevant that the appropriate fee at the time the unnecessary tap-on was installed was \$800 pursuant to the filed tariff doctrine, what is relevant is that Mr. Thomas should not have been charged any fee for an unnecessary service. The only fees applicable to Mr. Thomas under Evergreen's tariff are included in the schedule of rates for monthly water.

If Evergreen levied an unnecessary charge upon Mr. Thomas it would be a violation of its tariff. While it is not clear from the pleadings before the Commission if Evergreen has collected a fee for installation of the unnecessary tap-on, it is clear that to do so would subject Evergreen to the Commission's authority to seek penalties against the company. Section 386.570, RSMo 2000, authorizes the Commission to seek penalties "not less than one hundred dollars nor more than two thousand dollars for each offense," and each day a company is in violation of its tariff constitutes a separate and distinct offense. Penalties could be avoided, however, if correct billing adjustments were made pursuant to the Commission's rules on billing.³¹

The Commission notes that Evergreen is responsible for maintaining accurate books and records of its business pursuant to Chapter 10 of the Commission's Rules. It is Evergreen's burden to know the location of, and all elements of, its infrastructure and all locations and conditions of the tap-ons installed for its customers.

Additionally, Evergreen elected to become a corporation and avail itself of the privileges and protections of such designation under the laws of this state. With those privileges and protections attaches the responsibility for obtaining proper legal representation when actions are filed against it, should it desire to challenge or defend itself in those actions. If Evergreen chooses, as it has done in this case, not to respond to a complainant or the Commission's orders through proper representation, then it must accept the consequences of a default judgment. Based upon the facts of this case, Mr. Thomas is entitled to a

³⁰ It makes no difference if Evergreen's failure was the result of negligence or if it was intentional.

³¹ See Chapter 13 of the Commission's rules.

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default judgment against Evergreen.

IT IS ORDERED THAT:

1. Default judgment is hereby entered in favor of Complainant Guy Thomas against Respondent Evergreen Lakes Water Supply.

2. If Evergreen has, or does, collect any tap-on fee from Complainant Guy Thomas for the installation of the unnecessary tap-on, it shall be in violation of its tariffs for charging a customer for an unnecessary service.

3. Evergreen Lakes Water Supply shall, without charge, dig up the unused meter setting in Mr. Thomas' yard and cap the service line at the main by no later than September 15, 2008.

4. Evergreen Lakes Water Supply shall, without charge, level to grade and install lids on both valve boxes in Mr. Thomas' yard by no later than September 15, 2008, unless they are not active valve locations, in which case the company is ordered to remove the inactive valve boxes or bury them completely by no later than September 15, 2008.

5. The Staff of the Missouri Public Service Commission shall investigate Evergreen Lakes Water Supply to determine if it is in compliance with this order and file a report of its investigation no later than September 23, 2008.

6. This order shall become effective on August 22, 2008.

Davis, Chm, Murray, Clayton, Jarrett,
and Gunn, CC., concur.
Stearley, Senior Regulatory Law Judge

In the Matter of Aqua Missouri, Inc.'s Request for an Increase in Rates for Water Service Pursuant to the Commission's Small Company Rate Increase Procedure

*Case No. WR-2008-0266
Decided August 28, 2008*

Water §16. The Commission approved the unanimous agreement regarding disposition of small water company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.

Depreciation §1. The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small water company revenue increase request.

**ORDER APPROVING UNANIMOUS DISPOSITION AGREEMENT
AND APPROVING TARIFF**

This order approves a Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request among the Staff of the Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), and Aqua Missouri, Inc. ("Aqua Missouri" or "Company"), regarding Aqua Missouri's small company rate increase request, with certain conditions. It also approves the depreciation rates for the Company and approves a tariff implementing the agreed-upon rate increase. This agreement was made in conjunction with the settlement of related cases, SR-2008-0267, SR-2008-0268, and WR-2008-0269. The four cases followed the same procedural timeline.

Aqua Missouri provides water service to approximately 444 customers in its Lake Carmel and Maplewood water service areas.

On December 7, 2007, Aqua Missouri initiated a small company rate increase request under Commission Rule 4 CSR 240-3.635. The request was assigned Tracking No. QW-2008-0004 in the Commission's Electronic Filing and Information System. On February 19, 2008, the Commission opened this case for purposes of setting local public hearings and receiving comments related to the proposed rate increase request. Staff initiated an investigation of the Company, which included an audit of Aqua Missouri's books and records; a review of customer service, general business practices, and the operation of facilities; a review of the existing tariff; and an inspection of the Company's facilities.

Local public hearings were held in Reeds Spring, Shell Knob, Republic, Sedalia, Jefferson City, and Warsaw, Missouri, at which

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customers of Aqua Missouri presented their comments on the proposed rate increase. A second local public hearing was subsequently held in Jefferson City.

In its initial submissions to Staff, Aqua Missouri requested a rate increase that would generate an additional \$63,331 in annual water service operating revenues. After Staff's investigation, negotiations were held between Staff, Public Counsel, and Aqua Missouri which resulted in the July 3, 2008 filing of the Company/Staff Agreement Regarding Disposition of Small Water Company Revenue Increase Request ("Company/Staff Agreement"). Also on July 3, 2008, Aqua Missouri filed a proposed tariff (Tariff No. YW-2009-0019) bearing an effective date of August 18, 2008. Aqua Missouri voluntarily stayed the effective date of its July 3, 2008 tariff sheets to September 7, 2008.

The parties filed their Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request ("Unanimous Agreement") on August 26, 2008. The Unanimous Agreement replaces the Company/Staff Agreement. The parties agreed that a \$14,763 increase in the company's annual water service operating revenues is necessary for the company to recover its cost of service. The agreement also indicated that certain changes to bookkeeping, system operations, and administrative operations are appropriate.

In addition, Staff, Aqua Missouri, and Public Counsel agreed as follows:

- (1) That for the purpose of implementing the agreements set out herein, the Company will file substitute tariffs with the Commission to be consistent with this agreement before September 7, 2008 containing the rates, charges and language set out in the example tariff sheets attached hereto as Attachment A, with those proposed tariff revisions bearing an effective date of September 7, 2008.
- (2) That the rates set out in the attached example tariff sheets, attached hereto as Attachment A, are designed to generate additional revenues of \$14,763.
- (3) That the rates included in the attached example tariff sheets will result in the residential customer impacts shown on the billing comparison worksheet attached hereto as Attachment B.
- (4) That the rates included in the attached example tariff sheets are just and reasonable, and that the provisions

of the attached example tariff sheets also properly reflect all other agreements set out herein, where necessary.

- (5) That the schedule of depreciation rates attached hereto as Attachment C, should be the prescribed schedule of water plant depreciation rates for the Company.
- (6) That the Company will develop, implement and maintain records at the Jefferson City office of all new construction connections and develop and implement written procedures to enter this information into the Company's customer billing system daily. These records will at a minimum include the customer name, address, date of connection, dollar amount of tap-on fees, CIAC charges, connection fees and inspection fees. The Company will provide the Staff with written documentation it has implemented this process by November 30, 2008.
- (7) That the Company will develop and implement a process to ensure that new customer information is promptly entered into the billing system for all new construction customers connecting to the water system and all customers that purchase an existing home already connected to the water system. Part of this process will include running a monthly exception report which will document move-ins, move-outs and final bill customers. This report will be used by the local office to verify the status change of the listed customers. The Company will provide the Staff with written documentation that it has implemented this process by November 30, 2008.
- (8) That the Company will provide Staff and OPC in the Company's Jefferson City office, access to maps of its systems and update any missing maps to the extent it is feasible and possible prior to the filing of the Company's next rate case.
- (9) That the Company will maintain and update customers counts on a going forward basis and provide these updated counts to the managers of the Auditing and Water & Sewer Departments of Staff by April 15th and November 15th of each year.

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- (10) That the Company will immediately notify Staff of any substantial conversions in its billing system that could impact customer bills, and of any other substantial billing problems that occur in the future. This notification will be made to the managers of the Commission's Consumer Services and Water and Sewer Departments.
- (11) That the Company will provide a summary to Staff and OPC of call center training and personnel reviews for the call center representatives and regional office personnel by December 31, 2008.
- (12) That the Company will redirect all calls, except developer calls, to the call center and all call center calls will be recorded and retained for as long as technically feasible, but in no case less than six months.
- (13) That the Company will modify its employee time sheets to distinguish time spent on capital improvement projects versus operation and maintenance expense. The Company will continue to track employee's time by district. The Company will provide copies of the new time sheets to Staff by November 30, 2008.
- (14) That the Company will make adjustments to its books and records regarding the plant-in-service, depreciation reserve, and CIAC balances necessary to reflect the amounts used by the Staff in the calculation of the Company's overall cost of service calculation at December 31, 2007. The Company agrees these balances will be used as the starting point for entries subsequent to that date.
- (15) That the Company will develop Continuing Property Records and maintain these records regarding utility plant-in-service, depreciation reserves, CIAC, operating revenues and operating expenses in a manner sufficient to allow the Staff to conduct district specific cost-of-service analyses for future rate increase requests. The Company will provide copies of these records to the Staff by November 30, 2008.
- (16) That the Company will record plant retirements at the time the replacement plant items are put into service

and confirm that the item retired is actually being replaced by the item being placed in service.

- (17) That the Company will maintain all of its financial records in accordance with the Commission's Uniform System of Accounts.
- (18) That the Company will maintain detailed time records for the skid loader that at a minimum includes hours spent using the loader, the project worked on, the district in which the loader was used, and all supporting documentation.
- (19) That the Company will develop and implement the use of formal written procedures for all capital construction work orders that, at a minimum, include all individuals' responsibilities in the process, establish procedures for authorization of purchases, identify procedures for proper tracking of all purchases, including district separation, and ensure that all projects are closed in a timely manner.
- (20) That the Company maintain, by district, a log of elder valves and water meters that includes when each item was purchased, when it was removed from inventory, and where it was installed and identifies the type of use (new, replacement of defective part or part of a meter replacement program).
- (21) That the Company will initiate a task force to address timely meter reading within the 26 to 35 day window per Missouri regulations. The Company will provide quarterly reports on the number of reads outside the 26 to 35 day window for the next 18 months with the goal of reducing estimated reads and the pro-ration of bills.
- (22) That the Company will keep a tank painting log which will include information on each tank, the date of inspection, date last painted, who painted, warranty, and an estimate when the tank will need to be painted again.
- (23) That the Company will maintain a record of its meters pursuant to 4 CSR 240-10.030 section 2. This record will be developed and implemented by December 31, 2008.

- (24) That the Company's employees will investigate to determine the cause of lost water and take prudent and cost effective steps to correct the problems identified at Riverside, Lake Carmel and Ozark Mountain water systems by April 30, 2009.
- (25) That the Company will develop and implement the use of written procedures to process accounts payable that will eliminate duplicate payments and late fees. Copies of these procedures will be provided to Staff by November 30, 2008.
- (26) That the Company will develop, provide to Staff for Staff's review and implement the use of written procedures for the processing of the credit-card purchases made by employees. Copies of these written procedures will be provided to Staff by November 30, 2008.
- (27) That the Company will develop and implement the use of written procedures to ensure the proper assignment of costs to each of its districts. Copies of these procedures will be provided to Staff by November 30, 2008.
- (28) That the Company will designate a position, and identify the person currently in that position that will be responsible for ensuring and reporting that each one of the items in this agreement is completed.
- (29) That the Company will not back bill "newly found" customers. The Company will issue a credit and/or refund if a newly found customer is already billed and/or paid. Newly found is defined from the date the Company filed this rate case on December 7, 2007 to the date the new proposed tariffs go into effect.
- (30) The tariffs the PSC approves will contain the following language under Rule 10, titled Bills for Service:
Billing Adjustments
In the event of an undercharge due to errors in bill calculation, estimation or taxation, an adjustment shall be made for the entire period that the undercharge can be shown to have existed not to exceed twelve (12) monthly billing periods. The customer may request to pay for

this undercharge over a period of time not to exceed the number of months for which an adjustment was made. When there is evidence of tampering or diversion found, the Company will calculate the billing adjustment for the entire period during which the condition existed.

Back-billing

As the result of the settlement in Case No. WR-2008-0266 the Company shall not back-bill customers that are newly identified, i.e. customers that were on Aqua Missouri's system but were not receiving bills, at any time up to and including the conclusion date of the physical audit that will take place in the fourth quarter of 2008.

This new language will be filed with the tariff sheets filed by the company reflecting the Company/Staff agreed upon change in rates.

- (31) That the Company will implement the recommendations contained in the Engineering & Management Services Department ("EMSD") Report attached hereto as Attachment D no later than November 30, 2008.
- (32) The Company will mail its customers a written notice of the rates and charges included in its proposed tariff revisions within 15 days of entry of the Commission-approved Order. The notice will include a summary of the impact of the proposed rates on an average residential customer's bill. When the Company mails the notice to its customers, it will also send a copy to the Staff and the Staff will file a copy in the subject case file.
- (33) That the Company will notify Staff and OPC when each item in this Unanimous Agreement is completed.
- (34) That the Company acknowledges that the Staff will, and the OPC may, conduct follow-up reviews of the Company's operations to ensure that the Company has complied with the provisions of this Disposition Agreement.
- (35) That the Company acknowledges that the Staff or the OPC may file a formal complaint against it, if the

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Company does not comply with the provisions of this Disposition Agreement, and that the Staff or the OPC are not precluded from filing complaints under any other circumstances or fact situations.

(36) That the above agreements satisfactorily resolve all issues identified by the Staff and the Company regarding the Company's Request, except as otherwise specifically stated.

On August 26, 2008, Aqua Missouri filed substitute tariff sheets which replace the tariff sheets submitted on July 3, 2008. The Commission convened a hearing regarding the Unanimous Agreement on August 27, 2008. At the hearing, the parties indicated that there was no objection to the tariffs as submitted on August 26, 2008, and that there was no objection to those tariffs taking effect on September 7, 2008.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ In reviewing the agreement, the Commission notes that²

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

The Commission determines that in order to ensure the implementation of all of the provisions of the Unanimous Agreement, additional conditions on the approval of the Unanimous Agreement are necessary. The Commission shall require the following conditions:

¹ Section 536.060, RSMo Cum. Supp. 2007.

² Section 536.090, RSMo Cum. Supp. 2007. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

A. The maps required under paragraph (8) of the Unanimous Agreement shall be made available no later than November 30, 2008;

B. The designation of a person and a specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement as stated in paragraph (28) shall be provided no later than September 7, 2008; and

C. The Company shall verify that all customers have been found and are being billed properly no later than December 31, 2008.

The Commission finds that the Unanimous Agreement, with the additional conditions set out above, is reasonable and shall be approved. Aqua Missouri shall be directed to comply with the terms and recommendations set out in the Unanimous Agreement. Furthermore, Aqua Missouri's tariffs, and the rates they establish, are just and reasonable and shall be approved. The Commission also finds that the depreciation rates proposed by Staff are reasonable and will order Aqua Missouri to utilize them.

IT IS ORDERED THAT:

1. The Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request is approved with the additional conditions set out in Ordered Paragraphs 2 through 4 below.

2. Aqua Missouri, Inc., shall make available the maps required under paragraph (8) of the Unanimous Agreement no later than November 30, 2008.

3. Aqua Missouri, Inc., shall file in this case the name of the person and the specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement, as stated in paragraph (28), no later than September 7, 2008.

4. Aqua Missouri, Inc., shall verify that all customers have been found and are being billed properly, and shall file notification of the same in this case, no later than December 31, 2008.

5. Aqua Missouri, Inc., is directed to comply with the terms of the Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request.

6. The following tariff sheets, filed by Aqua Missouri, Inc., on August 26, 2008, and assigned Tariff File No. YW-2009-0019, are approved for service on and after September 7, 2008:

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P.S.C. MO. No. 1

**2nd (Revised) SHEET No. WR1, Canceling 1st (Revised) SHEET No. WR1
Second (Revised) SHEET No. WRR28, Canceling First (Revised) SHEET
No. WRR28**

7. The depreciation rates attached to the Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request as Attachment C are approved and such depreciation rates are to be used by Aqua Missouri, Inc. The depreciation rates are attached hereto.

8. This order shall become effective on September 7, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Disposition Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of Aqua Missouri, Inc.'s Request for an Increase in
Rates for Sewer Service Pursuant to the Commission's Small
Company Rate Increase Procedure.**

*Case No. SR-2008-0267
Decided August 28, 2008*

Sewer §14. The Commission approved the unanimous agreement regarding disposition of small sewer company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.

Depreciation §1. The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small sewer company revenue increase request.

**ORDER APPROVING UNANIMOUS DISPOSITION AGREEMENT
AND APPROVING TARIFF**

This order approves a Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request among the Staff of the Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), and Aqua Missouri, Inc. ("Aqua Missouri" or

“Company”), regarding Aqua Missouri’s small company rate increase request, with certain conditions. It also approves the depreciation rates for the Company and approves a tariff implementing the agreed-upon rate increase. This agreement was made in conjunction with the settlement of related cases, WR-2008-0266, SR-2008-0268, and WR-2008-0269. The four cases followed the same procedural timeline.

Aqua Missouri provides water service to approximately 1,795 customers in its Jefferson City sewer district and approximately 394 customers in its Maplewood sewer district.

On December 7, 2007, Aqua Missouri initiated a small company rate increase request under Commission Rule 4 CSR 240-3.330. The request was assigned Tracking No. QS-2008-0005 in the Commission’s Electronic Filing and Information System. On February 19, 2008, the Commission opened this case for purposes of setting local public hearings and receiving comments related to the proposed rate increase request. Staff initiated an investigation of the Company, which included an audit of Aqua Missouri’s books and records; a review of customer service, general business practices, and the operation of facilities; a review of the existing tariff; and an inspection of the Company’s facilities.

Local public hearings were held in Reeds Spring, Shell Knob, Republic, Sedalia, Jefferson City, and Warsaw, Missouri, at which customers of Aqua Missouri presented their comments on the proposed rate increase. A second local public hearing was subsequently held in Jefferson City.

In its initial submissions to Staff, Aqua Missouri requested a rate increase that would generate an additional \$700,892 in annual sewer service operating revenues. After Staff’s investigation, negotiations were held between Staff, Public Counsel, and Aqua Missouri which resulted in the July 3, 2008 filing of the Company/Staff Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request (“Company/Staff Agreement”). Also on July 3, 2008, Aqua Missouri filed a proposed tariff (Tariff No. YS-2009-0020) bearing an effective date of August 18, 2008. Aqua Missouri voluntarily stayed the effective date of its July 3, 2008 tariff sheets to September 7, 2008.

The parties filed their Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request (“Unanimous Agreement”)¹ on August 26, 2008. The Unanimous

¹ This is the title of the document as corrected by Staff’s Corrections for Filings filed August 28, 2008.

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Agreement replaces the Company/Staff Agreement. The parties agreed that a \$379,540 increase in the company's annual sewer service operating revenues is necessary for the company to recover its cost of service. The agreement also indicated that certain changes to bookkeeping, system operations, and administrative operations are appropriate.

In addition, Staff, Aqua Missouri, and Public Counsel agreed as follows:

- (1) That for the purpose of implementing the agreements set out herein, the Company will file substitute tariffs with the Commission to be consistent with this agreement before September 7, 2008 containing the rates, charges and language set out in the example tariff sheets attached hereto as Attachment A, with those proposed tariff revisions bearing an effective date of September 7, 2008.
- (2) That the rates set out in the attached example tariff sheets, attached hereto as Attachment A, are designed to generate additional revenues of \$379,540.
- (3) That the rates included in the attached example tariff sheets will result in the residential customer impacts shown on the billing comparison worksheet attached hereto as Attachment B.
- (4) That the rates included in the attached example tariff sheets are just and reasonable, and that the provisions of the attached example tariff sheets also properly reflect all other agreements set out herein, where necessary.
- (5) That the schedule of depreciation rates attached hereto as Attachment C, should be the prescribed schedule of sewer plant depreciation rates for the Company.
- (6) That the Company will develop, implement and maintain records at the Jefferson City office of all new construction connections and develop and implement written procedures to enter this information into the Company's customer billing system daily. These records will at a minimum include the customer name, address, date of connection, dollar amount of tap-on fees, CIAC charges, connection fees and inspection

fees. The Company will provide the Staff with written documentation it has implemented this process by November 30, 2008.

- (7) That the Company will develop and implement a process to ensure that new customer information is promptly entered into the billing system for all new construction customers connecting to the sewer system and all customers that purchase an existing home already connected to the sewer system. Part of this process will include running a monthly exception report which will document move-ins, move-outs and final bill customers. This report will be used by the local office to verify the status change of the listed customers. The Company will provide the Staff with written documentation that it has implemented this process by November 30, 2008.
- (8) That the Company will provide Staff and OPC in the Company's Jefferson City office, access to maps of its systems and update any missing maps to the extent it is feasible and possible prior to the filing of the Company's next rate case.
- (9) That the Company will maintain and update customers counts on a going forward basis and provide these updated counts to the managers of the Auditing and Water & Sewer Departments of Staff by April 15th and November 15th of each year.
- (10) That the Company will immediately notify Staff of any substantial conversions in its billing system that could impact customer bills, and of any other substantial billing problems that occur in the future. This notification will be made to the managers of the Commission's Consumer Services and Water and Sewer Departments.
- (11) That the Company will provide a summary to Staff and OPC of call center training and personnel reviews for the call center representatives and regional office personnel by December 31, 2008.
- (12) That the Company will redirect all calls, except developer calls, to the call center and all call center calls will be recorded and retained for as long as

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technically feasible, but in no case less than six months.

- (13) That the Company will modify its employee time sheets to distinguish time spent on capital improvement projects versus operation and maintenance expense. The Company will continue to track employee's time by district. The Company will provide copies of the new time sheets to Staff by November 30, 2008.
- (14) That the Company will make adjustments to its books and records regarding the plant-in-service, depreciation reserve, and CIAC balances necessary to reflect the amounts used by the Staff in the calculation of the Company's overall cost of service calculation at December 31, 2007. The Company agrees these balances will be used as the starting point for entries subsequent to that date.
- (15) That the Company will develop Continuing Property Records and maintain these records regarding utility plant-in-service, depreciation reserves, CIAC, operating revenues and operating expenses in a manner sufficient to allow the Staff to conduct district specific cost-of-service analyses for future rate increase requests. The Company will provide copies of these records to the Staff by November 30, 2008.
- (16) That the Company will record plant retirements at the time the replacement plant items are put into service and confirm that the item retired is actually being replaced by the item being placed in service.
- (17) That the Company will maintain all of its financial records in accordance with the Commission's Uniform System of Accounts.
- (18) That the Company will maintain detailed time records for the skid loader that at a minimum includes hours spent using the loader, the project worked on, the district in which the loader was used, and all supporting documentation.
- (19) That the Company will develop and implement the use of formal written procedures for all capital construction work orders that, at a minimum, include all individuals' responsibilities in the process, establish procedures for

authorization of purchases, identify procedures for proper tracking of all purchases, including district separation, and ensure that all projects are closed in a timely manner.

- (20) That the Company maintain, by district, a log of elder valves and water meters that includes when each item was purchased, when it was removed from inventory, and where it was installed and identifies the type of use (new, replacement of defective part or part of a meter replacement program).
- (21) That the Company will update the tariff language for its collecting sewer extension rule. The Company agrees to file proposed tariff changes to this rule by September 30, 2008.
- (22) That the Company will develop and implement the use of written procedures to process accounts payable that will eliminate duplicate payments and late fees. Copies of these procedures will be provided to Staff by November 30, 2008.
- (23) That the Company will develop, provide to Staff for Staff's review and implement the use of written procedures for the processing of the credit-card purchases made by employees. Copies of these written procedures will be provided to Staff by November 30, 2008.
- (24) That the Company will develop and implement the use of written procedures to ensure the proper assignment of costs to each of its districts. Copies of these procedures will be provided to Staff by November 30, 2008.
- (25) That the Company will designate a position, and identify the person currently in that position that will be responsible for ensuring and reporting that each one of the items in this agreement is completed.
- (26) That the Company will not back bill "newly found" customers. The Company will issue a credit and/or refund if a newly found customer is already billed and/or paid. Newly found is defined from the date the Company filed this rate case on December 7, 2007 to the date the new proposed tariffs go into effect.

- (27) The tariffs the PSC approves will contain the following language under Rule 9, titled Bills for Service:

Billing Adjustments

In the event of an undercharge due to errors in bill calculation, estimation or taxation, an adjustment shall be made for the entire period that the undercharge can be shown to have existed not to exceed twelve (12) monthly billing periods. The customer may request to pay for this undercharge over a period of time not to exceed the number of months for which an adjustment was made. When there is evidence of tampering or diversion found, the Company will calculate the billing adjustment for the entire period during which the condition existed.

Back-billing

As the result of the settlement in Case No. SR-2008-0267 the Company shall not back-bill customers that are newly identified, i.e. customers that were on Aqua Missouri's system but were not receiving bills, at any time up to and including the conclusion date of the physical audit that will take place in the fourth quarter of 2008.

This new language will be filed with the tariff sheets filed by the company reflecting the Company/Staff agreed upon change in rates.

- (28) That the Company will implement the recommendations contained in the Engineering & Management Services Department ("EMSD") Report attached hereto as Attachment D no later than November 30, 2008.
- (29) The Company will mail its customers a written notice of the rates and charges included in its proposed tariff revisions within 15 days of entry of the Commission-approved Order. The notice will include a summary of the impact of the proposed rates on an average residential customer's bill. When the Company mails the notice to its customers, it will also send a copy to the Staff and the Staff will file a copy in the subject case file.

- (30) That the Company will notify Staff and OPC when each item in this Unanimous Agreement is completed.
- (31) That the Company acknowledges that the Staff will, and the OPC may, conduct follow-up reviews of the Company's operations to ensure that the Company has complied with the provisions of this Disposition Agreement.
- (32) That the Company acknowledges that the Staff or the OPC may file a formal complaint against it, if the Company does not comply with the provisions of this Disposition Agreement, and that the Staff or the OPC are not precluded from filing complaints under any other circumstances or fact situations.
- (33) That the above agreements satisfactorily resolve all issues identified by the Staff and the Company regarding the Company's Request, except as otherwise specifically stated.

On August 26, 2008, Aqua Missouri filed substitute tariff sheets which replace the tariff sheets submitted on July 3, 2008. The Commission convened a hearing regarding the Unanimous Agreement on August 27, 2008. At the hearing, the parties indicated that there was no objection to the tariffs as submitted on August 26, 2008, and that there was no objection to those tariffs taking effect on September 7, 2008.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.² In reviewing the agreement, the Commission notes that³

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the

²Section 536.060, RSMo Cum. Supp. 2007.

³Section 536.090, RSMo Cum. Supp. 2007. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

opportunity to present evidence.⁴ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

The Commission determines that in order to ensure the implementation of all of the provisions of the Unanimous Agreement, additional conditions on the approval of the Unanimous Agreement are necessary. The Commission shall require the following conditions:

A. The maps required under paragraph (8) of the Unanimous Agreement shall be made available no later than November 30, 2008;

B. The designation of a person and a specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement as stated in paragraph (25) shall be provided no later than September 7, 2008; and

C. The Company shall verify that all customers have been found and are being billed properly no later than December 31, 2008.

The Commission finds that the Unanimous Agreement, with the additional conditions set out above, is reasonable and shall be approved. Aqua Missouri shall be directed to comply with the terms and recommendations set out in the Unanimous Agreement. Furthermore, Aqua Missouri's tariffs, and the rates they establish, are just and reasonable and shall be approved. The Commission also finds that the depreciation rates proposed by Staff are reasonable and will order Aqua Missouri to utilize them.

IT IS ORDERED THAT:

1. The Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request is approved with the additional conditions set out in Ordered Paragraphs 2 through 4 below.

2. Aqua Missouri, Inc., shall make available the maps required under paragraph (8) of the Unanimous Agreement no later than November 30, 2008.

3. Aqua Missouri, Inc., shall file in this case the name of the person and the specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement, as stated in paragraph (25), no later than September 7, 2008.

⁴ *State ex rel. Rex Deffendrfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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4. Aqua Missouri, Inc., shall verify that all customers have been found and are being billed properly, and shall file notification of the same in this case, no later than December 31, 2008.

5. Aqua Missouri, Inc., is directed to comply with the terms of the Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request.

6. The following tariff sheets, filed by Aqua Missouri, Inc., on August 26, 2008, and assigned Tariff File No. YS-2009-0020, are approved for service on and after September 7, 2008:

P.S.C. MO. No. 2

**3rd (Revised) SHEET No. SR1, Canceling 2nd (Revised) SHEET No. SR1
(1st Revised) SHEET No. SRR31, Canceling (Original) SHEET No. SRR31**

7. The depreciation rates attached to the Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request as Attachment C are approved and such depreciation rates are to be used by Aqua Missouri, Inc. The depreciation rates are attached hereto.

8. This order shall become effective on September 7, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

Note: The Disposition Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Aqua Missouri, Inc.'s Request for an Increase in Rates for Sewer Service Pursuant to the Commission's Small Company Rate Increase Procedure.

Case No. SR-2008-0268
Issue Date: August 28, 2008

Sewer §14. The Commission approved the unanimous agreement regarding disposition of small sewer company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.

Depreciation §1. The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small sewer company revenue increase request.

**ORDER APPROVING UNANIMOUS DISPOSITION AGREEMENT
AND APPROVING TARIFF**

This order approves a Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request among the Staff of the Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), and Aqua Missouri, Inc. ("Aqua Missouri" or "Company"), regarding Aqua Missouri's small company rate increase request, with certain conditions. It also approves the depreciation rates for the Company and approves a tariff implementing the agreed-upon rate increase. This agreement was made in conjunction with the settlement of related cases, WR-2008-0266, SR-2008-0267, and WR-2008-0269. The four cases followed the same procedural timeline.

Aqua Missouri provides water service to approximately 22 customers in its Ozark Meadows sewer service area.

On December 7, 2007, Aqua Missouri initiated a small company rate increase request under Commission Rule 4 CSR 240-3.330. The request was assigned Tracking No. QS-2008-0006 in the Commission's Electronic Filing and Information System. On February 19, 2008, the Commission opened this case for purposes of setting local public hearings and receiving comments related to the proposed rate increase request. Staff initiated an investigation of the Company, which included an audit of Aqua Missouri's books and records; a review of customer service, general business practices, and the operation of facilities; a review of the existing tariff; and an inspection of the Company's facilities.

Local public hearings were held in Reeds Spring, Shell Knob, Republic, Sedalia, Jefferson City, and Warsaw, Missouri, at which customers of Aqua Missouri presented their comments on the proposed rate increase. A second local public hearing was subsequently held in Jefferson City.

In its initial submissions to Staff, Aqua Missouri requested a rate increase that would generate an additional \$9,625 in annual sewer service operating revenues. After Staff's investigation, negotiations were held between Staff, Public Counsel, and Aqua Missouri which resulted in the July 3, 2008 filing of the Company/Staff Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request ("Company/Staff Agreement"). Also on July 3, 2008, Aqua Missouri filed a proposed tariff (Tariff No. YS-2009-0018) bearing an effective date of

August 18, 2008. Aqua Missouri voluntarily stayed the effective date of its July 3, 2008 tariff sheets to September 7, 2008.

The parties filed their Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request ("Unanimous Agreement")¹ on August 26, 2008. The Unanimous Agreement replaces the Company/Staff Agreement. The parties agreed that a \$9,179 increase in the company's annual sewer service operating revenues is necessary for the company to recover its cost of service. The agreement also indicated that certain changes to bookkeeping, system operations, and administrative operations are appropriate.

In addition, Staff, Aqua Missouri, and Public Counsel agreed as follows:

- (1) That for the purpose of implementing the agreements set out herein, the Company will file substitute tariffs with the Commission to be consistent with this agreement before September 7, 2008 containing the rates, charges and language set out in the example tariff sheets attached hereto as Attachment A, with those proposed tariff revisions bearing an effective date of September 7, 2008.
- (2) That the rates set out in the attached example tariff sheets, attached hereto as Attachment A, are designed to generate additional revenues of \$9,179.
- (3) That the rates included in the attached example tariff sheets will result in the residential customer impacts shown on the billing comparison worksheet attached hereto as Attachment B.
- (4) That the rates included in the attached example tariff sheets are just and reasonable, and that the provisions of the attached example tariff sheets also properly reflect all other agreements set out herein, where necessary.
- (5) That the schedule of depreciation rates attached hereto as Attachment C, should be the prescribed schedule of sewer plant depreciation rates for the Company.
- (6) That the Company will develop, implement and maintain records at the Jefferson City office of all new

¹ This is the title of the document as corrected by Staff's Corrections for Filings filed August 28, 2008.

construction connections and develop and implement written procedures to enter this information into the Company's customer billing system daily. These records will at a minimum include the customer name, address, date of connection, dollar amount of tap-on fees, CIAC charges, connection fees and inspection fees. The Company will provide the Staff with written documentation it has implemented this process by November 30, 2008.

- (7) That the Company will develop and implement a process to ensure that new customer information is promptly entered into the billing system for all new construction customers connecting to the sewer system and all customers that purchase an existing home already connected to the sewer system. Part of this process will include running a monthly exception report which will document move-ins, move-outs and final bill customers. This report will be used by the local office to verify the status change of the listed customers. The Company will provide the Staff with written documentation that it has implemented this process by November 30, 2008.
- (8) That the Company will provide Staff and OPC in the Company's Jefferson City office, access to maps of its systems and update any missing maps to the extent it is feasible and possible prior to the filing of the Company's next rate case.
- (9) That the Company will maintain and update customers counts on a going forward basis and provide these updated counts to the managers of the Auditing and Water & Sewer Departments of Staff by April 15th and November 15th of each year.
- (10) That the Company will immediately notify Staff of any substantial conversions in its billing system that could impact customer bills, and of any other substantial billing problems that occur in the future. This notification will be made to the managers of the Commission's Consumer Services and Water and Sewer Departments.

- (11) That the Company will provide a summary to Staff and OPC of call center training and personnel reviews for the call center representatives and regional office personnel by December 31, 2008.
- (12) That the Company will redirect all calls, except developer calls, to the call center and all call center calls will be recorded and retained for as long as technically feasible, but in no case less than six months.
- (13) That the Company will modify its employee time sheets to distinguish time spent on capital improvement projects versus operation and maintenance expense. The Company will continue to track employee's time by district. The Company will provide copies of the new time sheets to Staff by November 30, 2008.
- (14) That the Company will make adjustments to its books and records regarding the plant-in-service, depreciation reserve, and CIAC balances necessary to reflect the amounts used by the Staff in the calculation of the Company's overall cost of service calculation at December 31, 2007. The Company agrees these balances will be used as the starting point for entries subsequent to that date.
- (15) That the Company will develop Continuing Property Records and maintain these records regarding utility plant-in-service, depreciation reserves, CIAC, operating revenues and operating expenses in a manner sufficient to allow the Staff to conduct district specific cost-of-service analyses for future rate increase requests. The Company will provide copies of these records to the Staff by November 30, 2008.
- (16) That the Company will record plant retirements at the time the replacement plant items are put into service and confirm that the item retired is actually being replaced by the item being placed in service.
- (17) That the Company will maintain all of its financial records in accordance with the Commission's Uniform System of Accounts.
- (18) That the Company will maintain detailed time records for the skid loader that at a minimum includes hours spent

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using the loader, the project worked on, the district in which the loader was used, and all supporting documentation.

- (19) That the Company will develop and implement the use of formal written procedures for all capital construction work orders that, at a minimum, include all individuals' responsibilities in the process, establish procedures for authorization of purchases, identify procedures for proper tracking of all purchases, including district separation, and ensure that all projects are closed in a timely manner.
- (20) That the Company maintain, by district, a log of elder valves and water meters that includes when each item was purchased, when it was removed from inventory, and where it was installed and identifies the type of use (new, replacement of defective part or part of a meter replacement program).
- (21) That the Company will update the tariff language for its collecting sewer extension rule. The Company agrees to file proposed tariff changes to this rule by September 30, 2008.
- (22) That the Company will develop and implement the use of written procedures to process accounts payable that will eliminate duplicate payments and late fees. Copies of these procedures will be provided to Staff by November 30, 2008.
- (23) That the Company will develop, provide to Staff for Staff's review and implement the use of written procedures for the processing of the credit-card purchases made by employees. Copies of these written procedures will be provided to Staff by November 30, 2008.
- (24) That the Company will develop and implement the use of written procedures to ensure the proper assignment of costs to each of its districts. Copies of these procedures will be provided to Staff by November 30, 2008.
- (25) That the Company will designate a position, and identify the person currently in that position that will be

responsible for ensuring and reporting that each one of the items in this agreement is completed.

(26) That the Company will not back bill "newly found" customers. The Company will issue a credit and/or refund if a newly found customer is already billed and/or paid. Newly found is defined from the date the Company filed this rate case on December 7, 2007 to the date the new proposed tariffs go into effect.

(27) The tariffs the PSC approves will contain the following language under Rule 9, titled Bills for Service:

Billing Adjustments

In the event of an undercharge due to errors in bill calculation, estimation or taxation, an adjustment shall be made for the entire period that the undercharge can be shown to have existed not to exceed twelve (12) monthly billing periods. The customer may request to pay for this undercharge over a period of time not to exceed the number of months for which an adjustment was made. When there is evidence of tampering or diversion found, the Company will calculate the billing adjustment for the entire period during which the condition existed.

Back-billing

As the result of the settlement in Case No. SR-2008-0268 the Company shall not back-bill customers that are newly identified, i.e. customers that were on Aqua Missouri's system but were not receiving bills, at any time up to and including the conclusion date of the physical audit that will take place in the fourth quarter of 2008.

This new language will be filed with the tariff sheets filed by the company reflecting the Company/Staff agreed upon change in rates.

(28) That the Company will implement the recommendations contained in the Engineering & Management Services Department ("EMSD") Report attached hereto as Attachment D no later than November 30, 2008.

- (29) The Company will mail its customers a written notice of the rates and charges included in its proposed tariff revisions within 15 days of entry of the Commission-approved Order. The notice will include a summary of the impact of the proposed rates on an average residential customer's bill. When the Company mails the notice to its customers, it will also send a copy to the Staff and the Staff will file a copy in the subject case file.
- (30) That the Company will notify Staff and OPC when each item in this Unanimous Agreement is completed.
- (31) That the Company acknowledges that the Staff will, and the OPC may, conduct follow-up reviews of the Company's operations to ensure that the Company has complied with the provisions of this Disposition Agreement.
- (32) That the Company acknowledges that the Staff or the OPC may file a formal complaint against it, if the Company does not comply with the provisions of this Disposition Agreement, and that the Staff or the OPC are not precluded from filing complaints under any other circumstances or fact situations.
- (33) That the above agreements satisfactorily resolve all issues identified by the Staff and the Company regarding the Company's Request, except as otherwise specifically stated.

On August 26, 2008, Aqua Missouri filed substitute tariff sheets which replace the tariff sheets submitted on July 3, 2008. The Commission convened a hearing regarding the Unanimous Agreement on August 27, 2008. At the hearing, the parties indicated that there was no objection to the tariffs as submitted on August 26, 2008, and that there was no objection to those tariffs taking effect on September 7, 2008.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.² In reviewing the agreement, the Commission notes that³

²Section 536.060, RSMo Cum. Supp. 2007.

³Section 536.090, RSMo Cum. Supp. 2007. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.⁴ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

The Commission determines that in order to ensure the implementation of all of the provisions of the Unanimous Agreement, additional conditions on the approval of the Unanimous Agreement are necessary. The Commission shall require the following conditions:

A. The maps required under paragraph (8) of the Unanimous Agreement shall be made available no later than November 30, 2008;

B. The designation of a person and a specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement as stated in paragraph (25) shall be provided no later than September 7, 2008; and

C. The Company shall verify that all customers have been found and are being billed properly no later than December 31, 2008.

The Commission finds that the Unanimous Agreement, with the additional conditions set out above, is reasonable and shall be approved. Aqua Missouri shall be directed to comply with the terms and recommendations set out in the Unanimous Agreement. Furthermore, Aqua Missouri's tariffs, and the rates they establish, are just and reasonable and shall be approved. The Commission also finds that the depreciation rates proposed by Staff are reasonable and will order Aqua Missouri to utilize them.

IT IS ORDERED THAT:

1. The Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request is approved with the additional conditions set out in Ordered Paragraphs 2 through 4 below.

⁴ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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2. Aqua Missouri, Inc., shall make available the maps required under paragraph (8) of the Unanimous Agreement no later than November 30, 2008.

3. Aqua Missouri, Inc., shall file in this case the name of the person and the specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement, as stated in paragraph (25), no later than September 7, 2008.

4. Aqua Missouri, Inc., shall verify that all customers have been found and are being billed properly, and shall file notification of the same in this case, no later than December 31, 2008.

5. Aqua Missouri, Inc., is directed to comply with the terms of the Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request.

6. The following tariff sheets, filed by Aqua Missouri, Inc., on August 26, 2008, and assigned Tariff File No. YS-2009-0018, are approved for service on and after September 7, 2008:

P.S.C. MO. No. 1

**2nd (Revised) SHEET No. 4, Canceling 1st (Revised) SHEET No. 4
1st (Revised) SHEET No. 21, Replacing (Original) SHEET No. 21**

7. The depreciation rates attached to the Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request as Attachment C are approved and such depreciation rates are to be used by Aqua Missouri, Inc. The depreciation rates are attached hereto.

8. This order shall become effective on September 7, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Disposition Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Aqua Missouri, Inc.'s Request for an Increase in Rates for Water Service Pursuant to the Commission's Small Company Rate Increase Procedure.

*Case No. WR-2008-0269
Decided August 28, 2008*

Water §16. The Commission approved the unanimous agreement regarding disposition of small water company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.

Depreciation §1. The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small water company revenue increase request.

**ORDER APPROVING UNANIMOUS DISPOSITION AGREEMENT
AND APPROVING TARIFF**

This order approves a Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request among the Staff of the Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), and Aqua Missouri, Inc. ("Aqua Missouri" or "Company"), regarding Aqua Missouri's small company rate increase request, with certain conditions. It also approves the depreciation rates for the Company and approves a tariff implementing the agreed-upon rate increase. This agreement was made in conjunction with the settlement of related cases, WR-2008-0266, SR-2008-0267, and SR-2008-0268. The four cases followed the same procedural timeline.

Aqua Missouri provides water service to approximately 35 customers in Lakewood Manor, 103 in LTA, 444 in Ozark Mountain, 88 in Rankin Acres, 289 in Riverside Estates, 121 in Spring Valley, and 182 in White Branch.

On December 7, 2007, Aqua Missouri initiated a small company rate increase request under Commission Rule 4 CSR 240-3.635. The request was assigned Tracking No. QW-2008-0007 in the Commission's Electronic Filing and Information System. On February 19, 2008, the Commission opened this case for purposes of setting local public hearings and receiving comments related to the proposed rate increase request. Staff initiated an investigation of the Company, which included an audit of Aqua Missouri's books and records; a review of customer service, general business practices, and the operation of facilities; a review of the existing tariff; and an inspection of the Company's facilities.

Local public hearings were held in Reeds Spring, Shell Knob, Republic, Sedalia, Jefferson City, and Warsaw, Missouri, at which customers of Aqua Missouri presented their comments on the proposed

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rate increase. A second local public hearing was subsequently held in Jefferson City.

In its initial submissions to Staff, Aqua Missouri requested a rate increase that would generate an additional \$340,578 in annual water service operating revenues. After Staff's investigation, negotiations were held between Staff, Public Counsel, and Aqua Missouri which resulted in the July 3, 2008 filing of the Company/Staff Agreement Regarding Disposition of Small Water Company Revenue Increase Request ("Company/Staff Agreement"). Also on July 3, 2008, Aqua Missouri filed a proposed tariff (Tariff No. YW-2009-0017) bearing an effective date of August 18, 2008. Aqua Missouri voluntarily stayed the effective date of its July 3, 2008 tariff sheets to September 7, 2008.

The parties filed their Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request ("Unanimous Agreement") on August 26, 2008. The Unanimous Agreement replaces the Company/Staff Agreement. The parties agreed that a \$150,908 increase in the company's annual water service operating revenues is necessary for the company to recover its cost of service. The agreement also indicated that certain changes to bookkeeping, system operations, and administrative operations are appropriate.

In addition, Staff, Aqua Missouri, and Public Counsel agreed as follows:

- (1) That for the purpose of implementing the agreements set out herein, the Company will file substitute tariffs with the Commission to be consistent with this agreement before September 7, 2008 containing the rates, charges and language set out in the example tariff sheets attached hereto as Attachment A, with those proposed tariff revisions bearing an effective date of September 7, 2008.
- (2) That the rates set out in the attached example tariff sheets, attached hereto as Attachment A, are designed to generate additional revenues of \$150,908.
- (3) That the rates included in the attached example tariff sheets will result in the residential customer impacts shown on the billing comparison worksheet attached hereto as Attachment B.

- (4) That the rates included in the attached example tariff sheets are just and reasonable, and that the provisions of the attached example tariff sheets also properly reflect all other agreements set out herein, where necessary.
- (5) That the schedule of depreciation rates attached hereto as Attachment C, should be the prescribed schedule of water plant depreciation rates for the Company.
- (6) That the Company will develop, implement and maintain records at the Jefferson City office of all new construction connections and develop and implement written procedures to enter this information into the Company's customer billing system daily. These records will at a minimum include the customer name, address, date of connection, dollar amount of tap-on fees, CIAC charges, connection fees and inspection fees. The Company will provide the Staff with written documentation it has implemented this process by November 30, 2008.
- (7) That the Company will develop and implement a process to ensure that new customer information is promptly entered into the billing system for all new construction customers connecting to the water system and all customers that purchase an existing home already connected to the water system. Part of this process will include running a monthly exception report which will document move-ins, move-outs and final bill customers. This report will be used by the local office to verify the status change of the listed customers. The Company will provide the Staff with written documentation that it has implemented this process by November 30, 2008.
- (8) That the Company will provide Staff and OPC in the Company's Jefferson City office, access to maps of its systems and update any missing maps to the extent it is feasible and possible prior to the filing of the Company's next rate case.
- (9) That the Company will maintain and update customers counts on a going forward basis and provide these updated counts to the managers of the Auditing and

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Water & Sewer Departments of Staff by April 15th and November 15th of each year.

- (10) That the Company will immediately notify Staff of any substantial conversions in its billing system that could impact customer bills, and of any other substantial billing problems that occur in the future. This notification will be made to the managers of the Commission's Consumer Services and Water and Sewer Departments.
- (11) That the Company will provide a summary to Staff and OPC of call center training and personnel reviews for the call center representatives and regional office personnel by December 31, 2008.
- (12) That the Company will redirect all calls, except developer calls, to the call center and all call center calls will be recorded and retained for as long as technically feasible, but in no case less than six months.
- (13) That the Company will modify its employee time sheets to distinguish time spent on capital improvement projects versus operation and maintenance expense. The Company will continue to track employee's time by district. The Company will provide copies of the new time sheets to Staff by November 30, 2008.
- (14) That the Company will make adjustments to its books and records regarding the plant-in-service, depreciation reserve, and CIAC balances necessary to reflect the amounts used by the Staff in the calculation of the Company's overall cost of service calculation at December 31, 2007. The Company agrees these balances will be used as the starting point for entries subsequent to that date.
- (15) That the Company will develop Continuing Property Records and maintain these records regarding utility plant-in-service, depreciation reserves, CIAC, operating revenues and operating expenses in a manner sufficient to allow the Staff to conduct district specific cost-of-service analyses for future rate increase requests. The Company will provide copies of these records to the Staff by November 30, 2008.

- (16) That the Company will record plant retirements at the time the replacement plant items are put into service and confirm that the item retired is actually being replaced by the item being placed in service.
- (17) That the Company will maintain all of its financial records in accordance with the Commission's Uniform System of Accounts.
- (18) That the Company will maintain detailed time records for the skid loader that at a minimum includes hours spent using the loader, the project worked on, the district in which the loader was used, and all supporting documentation.
- (19) That the Company will develop and implement the use of formal written procedures for all capital construction work orders that, at a minimum, include all individuals' responsibilities in the process, establish procedures for authorization of purchases, identify procedures for proper tracking of all purchases, including district separation, and ensure that all projects are closed in a timely manner.
- (20) That the Company maintain, by district, a log of elder valves and water meters that includes when each item was purchased, when it was removed from inventory, and where it was installed and identifies the type of use (new, replacement of defective part or part of a meter replacement program).
- (21) That the Company will initiate a task force to address timely meter reading within the 26 to 35 day window per Missouri regulations. The Company will provide quarterly reports on the number of reads outside the 26 to 35 day window for the next 18 months with the goal of reducing estimated reads and the pro-ration of bills.
- (22) That the Company will install water meters in the Rankin Acres service area consistently over the five year period ending August 1, 2013.
- (23) That the Company will keep a tank painting log which will include information on each tank, the date of inspection, date last painted, who painted, warranty,

and an estimate when the tank will need to be painted again.

- (24) That the Company will maintain a record of its meters pursuant to 4 CSR 240-10.030 section 2. This record will be developed by December 31, 2008.
- (25) That the Company will develop and implement the use of written procedures to process accounts payable that will eliminate duplicate payments and late fees. Copies of these procedures will be provided to Staff by November 30, 2008.
- (26) That the Company will develop, provide to Staff for Staff's review and implement the use of written procedures for the processing of the credit-card purchases made by employees. Copies of these written procedures will be provided to Staff by November 30, 2008.
- (27) That the Company will develop and implement the use of written procedures to ensure the proper assignment of costs to each of its districts. Copies of these procedures will be provided to Staff by November 30, 2008.
- (28) That the Company will designate a position, and identify the person currently in that position that will be responsible for ensuring and reporting that each one of the items in this agreement is completed.
- (29) That the Company will not back bill "newly found" customers. The Company will issue a credit and/or refund if a newly found customer is already billed and/or paid. Newly found is defined from the date the Company filed this rate case on December 7, 2007 to the date the new proposed tariffs go into effect.
- (30) The tariffs the PSC approves will contain the following language under Rule 10, titled Bills for Service:
Billing Adjustments
In the event of an undercharge due to errors in bill calculation, estimation or taxation, an adjustment shall be made for the entire period that the undercharge can be shown to have existed not to exceed twelve (12) monthly billing periods. The customer may request to pay for

this undercharge over a period of time not to exceed the number of months for which an adjustment was made. When there is evidence of tampering or diversion found, the Company will calculate the billing adjustment for the entire period during which the condition existed.

Back-billing

As the result of the settlement in Case No. WR-2008-0269 the Company shall not back-bill customers that are newly identified, i.e. customers that were on Aqua Missouri's system but were not receiving bills, at any time up to and including the conclusion date of the physical audit that will take place in the fourth quarter of 2008.

This new language will be filed with the tariff sheets filed by the company reflecting the Company/Staff agreed upon change in rates.

- (31) That the Company will implement the recommendations contained in the Engineering & Management Services Department ("EMSD") Report attached hereto as Attachment D no later than November 30, 2008.
- (32) The Company will mail its customers a written notice of the rates and charges included in its proposed tariff revisions within 15 days of entry of the Commission-approved Order. The notice will include a summary of the impact of the proposed rates on an average residential customer's bill. When the Company mails the notice to its customers, it will also send a copy to the Staff and the Staff will file a copy in the subject case file.
- (33) That the Company will notify Staff and OPC when each item in this Unanimous Agreement is completed.
- (34) That the Company acknowledges that the Staff will, and the OPC may, conduct follow-up reviews of the Company's operations to ensure that the Company has complied with the provisions of this Disposition Agreement.
- (35) That the Company acknowledges that the Staff or the OPC may file a formal complaint against it, if the

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Company does not comply with the provisions of this Disposition Agreement, and that the Staff or the OPC are not precluded from filing complaints under any other circumstances or fact situations.

(36) That the above agreements satisfactorily resolve all issues identified by the Staff and the Company regarding the Company's Request, except as otherwise specifically stated.

On August 26, 2008, Aqua Missouri filed substitute tariff sheets which replace the tariff sheets submitted on July 3, 2008. The Commission convened a hearing regarding the Unanimous Agreement on August 27, 2008. At the hearing, the parties indicated that there was no objection to the tariffs as submitted on August 26, 2008, and that there was no objection to those tariffs taking effect on September 7, 2008.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ In reviewing the agreement, the Commission notes that²

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

The Commission determines that in order to ensure the implementation of all of the provisions of the Unanimous Agreement, additional conditions on the approval of the Unanimous Agreement are necessary. The Commission shall require the following conditions:

¹Section 536.060, RSMo Cum. Supp. 2007.

²Section 536.090, RSMo Cum. Supp. 2007. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

A. The maps required under paragraph (8) of the Unanimous Agreement shall be made available no later than November 30, 2008;

B. The designation of a person and a specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement as stated in paragraph (28) shall be provided no later than September 7, 2008; and

C. The Company shall verify that all customers have been found and are being billed properly no later than December 31, 2008.

The Commission finds that the Unanimous Agreement, with the additional conditions set out above, is reasonable and shall be approved. Aqua Missouri shall be directed to comply with the terms and recommendations set out in the Unanimous Agreement. Furthermore, Aqua Missouri's tariffs, and the rates they establish, are just and reasonable and shall be approved. The Commission also finds that the depreciation rates proposed by Staff are reasonable and will order Aqua Missouri to utilize them.

IT IS ORDERED THAT:

1. The Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request is approved with the additional conditions set out in Ordered Paragraphs 2 through 4 below.

2. Aqua Missouri, Inc., shall make available the maps required under paragraph (8) of the Unanimous Agreement no later than November 30, 2008.

3. Aqua Missouri, Inc., shall file in this case the name of the person and the specific position within the Company to be responsible for ensuring and reporting compliance with the Unanimous Agreement, as stated in paragraph (28), no later than September 7, 2008.

4. Aqua Missouri, Inc., shall verify that all customers have been found and are being billed properly, and shall file notification of the same in this case, no later than December 31, 2008.

5. Aqua Missouri, Inc., is directed to comply with the terms of the Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request.

6. The following tariff sheets, filed by Aqua Missouri, Inc., on August 26, 2008, and assigned Tariff File No. YS-2009-0017, are approved for service on and after September 7, 2008:

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P.S.C. MO. No. 2

4th (Revised) SHEET No. WR2, Canceling 3rd (Revised) SHEET No. WR2
3rd (Revised) SHEET No. WR4, Canceling 2nd (Revised) SHEET No. WR4
2nd (Revised) SHEET No. WR5, Canceling 1st (Revised) SHEET No. WR5
2nd (Revised) SHEET No. WR6, Canceling 1st (Revised) SHEET No. WR6
2nd (Revised) SHEET No. WR7, Canceling 1st (Revised) SHEET No. WR7
2nd (Revised) SHEET No. WR8, Canceling 1st (Revised) SHEET No. WR8
Second (Revised) SHEET No. WRR29, Canceling First (Revised) SHEET
No. WRR29

7. The depreciation rates attached to the Unanimous Agreement Regarding Disposition of Small Water Company Revenue Increase Request as Attachment C are approved and such depreciation rates are to be used by Aqua Missouri, Inc. The depreciation rates are attached hereto.

8. This order shall become effective on September 7, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Disposition Agreement in this case has not been published. If needed, this document is available in the official case files of the Public service Commission.

In the Matter of the Application of Central Jefferson County Utilities, Inc. for an order authorizing the transfer and assignment of certain water and sewer assets to Jefferson County Public Sewer District and in connection therewith, certain other related transactions.

*Case No. SO-2007-0071
consolidated with WO-2007-0072
Decided September 16, 2008*

Sewer §1. The Commission corrected its conclusions of law but retained its findings of facts pursuant to the Circuit Court's finding that the Commission's findings of statutory violations were unlawful.

ORDER OF CORRECTION

On February 8, 2007, the Commission issued its Report and Order

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(“Order”) in this matter. The Order bore an effective date of February 28, 2007. On February 27, 2007, Central Jefferson County Utilities, Inc. (“CJCU”) filed its application for rehearing. The Commission denied that motion on April 24, 2007, and on May 21, 2007, CJCU filed a petition for a writ of review in the Circuit Court of Cole County.¹

CJCU only alleged one error in its application for rehearing in SO-2007-0071, claiming that the portion of the Order authorizing General Counsel to seek penalties was unlawful. That single contention was further qualified when CJCU stated that it sought rehearing “to eliminate those provisions in the Report and Order purporting to find basis for, or authorize, the General Counsel to seek penalties against Central Jefferson.”² This is the only point of alleged error that was preserved for review by the Circuit Court in the writ of review proceeding.

On June 30, 2008,³ the Circuit Court issued its “Findings of Fact, Conclusions of Law and Judgment in the writ of review proceeding, wherein it remanded this case to the Commission with instructions to delete certain conclusions of law. The Court’s specific language is as follows:⁴

The court therefore finds the Case No. SO-2007-0071 *findings* of statutory violation to be unlawful, having been achieved by procedure not authorized by law. The Report and Order is reversed in these respects and remanded to the Commission with the direction to delete such *findings*. (Emphasis added).

The Commission can only assume the Circuit Court was referencing the Commission’s *conclusions of law*,⁵ on pages 37-39 of the Order, where the following specific *conclusions* regarding *statutory violations* were delineated:⁶

Consequently, the Commission shall order its General

¹ That case was docketed as Case No. 07AC-CC00444.

² Section 386.500.2, provides, in pertinent part, that an “applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.” In order to properly preserve an issue for review by the courts, that issue must be pled in the application for rehearing. *State ex rel. Missouri Gas Energy v. Public Service Com’n*, 186 S.W.3d 376, 390 (Mo. App. 2005).

³ All dates further referenced in this order refer to the year 2008 unless otherwise specified.

⁴ *Findings of Fact, Conclusions of Law and Judgment*, Case No. 07AC-CC00444, In the Circuit Court of Cole County State of Missouri, June 30, 2008.

⁵ There were no “findings of fact” that specifically referenced “statutory violations.”

⁶ *In the Matter of the Application of Central Jefferson County Utilities, Inc. for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2007-0071, Report and Order, issued February 8, 2008, effective February 28, 2008.

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Counsel to seek the maximum amount in penalties from Central Jefferson for the following violations:

- a. Every violation of the Missouri Clean Water Act, Sections 644.051(1) and (2), and Section 644.076.1, as found by the DNR, is a violation of Commission Rule 4 CSR 240-60.020.1, in that Central Jefferson failed to maintain and operate a sewage treatment facility of adequate capacity and properly equipped to treat the sewage and discharge effluent of the quality required by the laws of the state of Missouri and in other respects failed to comply with the laws and regulations of the state and local health authority. Each violation is a separate and distinct offense, and each day forward from the date that DNR found the violation, and Central Jefferson failed to bring its system into compliance, is a separate and distinct offense.
- b. Every violation of 10 CSR 20-6.010(1)(A) & 5(A), 10 CSR 20- 7.015(9)(A)(1), 10 CSR 20-7.031(3)(A), (B), & (C), and 10 CSR 20-9.020(2), as found by the DNR, is a violation of Commission Rule 4 CSR 240-60.020.1, in that Central Jefferson failed to maintain and operate a sewage treatment facility of adequate capacity and properly equipped to treat the sewage and discharge effluent of the quality required by the laws of the state of Missouri and in other respects failed to comply with the laws and regulations of the state and local health authority. Each violation is a separate and distinct offense, and each day forward from the date that DNR found the violation, and Central Jefferson failed to bring its system into compliance, is a separate and distinct offense.
- c. Each day that the capacity of Central Jefferson wastewater treatment facility was exceeded was a failure of Central Jefferson to maintain and operate its sewage treatment facility with adequate capacity and is a violation of Commission Rule 4 CSR 240-60.020.1 and Section 393.130.1. Central Jefferson's sewer treatment facility capacity has been exceeded every day since on or about July 1, 2000, each day thereafter being a separate and distinct offense.

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d. Each day that Central Jefferson failed to make reasonable efforts to eliminate or prevent the entry of surface or ground water, and each day that Central Jefferson did in fact fail to eliminate or prevent the entry of surface or ground water, into its sanitary sewer system is a violation of Commission Rule 4 CSR 240-60.020.3 and Section 393.130.1. This problem was identified as arising on or about December 1, 2003, each day forward being a separate and distinct offense.

e. Each day that Central Jefferson has been unable to provide adequate storage of uncontaminated drinking water, to ensure the safe and adequate provision of water services is a violation of Section 393.130.1. DNR documented annual water consumption figures exceeding the demand of Central Jefferson's storage capacity in 2005. Consequently, each day forward from on or about January 1, 2005 when adequate reserves were unavailable is a separate and distinct offense.

Should the General Counsel wish to develop additional factual support for the violations found in this contested hearing, or to support additional violations for which a penalty is authorized, then it shall file a complaint with the Commission against Central Jefferson asserting any allegations the General Counsel wishes to pursue.

The Commission must also assume, although the Circuit Court did not state such, that if the process was defective for rendering the conclusions of law regarding statutory violations, that the process must have also been defective for reaching the conclusions regarding the violations of the code of regulations. Having so remanded on the basis that the Commission's conclusions of law regarding "violations" were achieved by a procedure not authorized by law, the Commission shall correct the pertinent portion of its February 8, 2007 Report and Order striking all of the language quoted above currently appearing on pages 37-39 of the Order. Additionally, the last sentence in that passage shall be replaced with the following language:

Should the General Counsel wish to develop additional factual support for any potential statutory and rule violations unearthed in this contested hearing, that

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may ultimately result in a penalty action, then it shall file a complaint with the Commission against Central Jefferson asserting any allegations the General Counsel wishes to pursue.

Also, in keeping with the Circuit Court's decision and the need to conform the entire Order to its ruling, the Commission shall strike the following Ordered Paragraphs from the Order:

5. The General Counsel of the Missouri Public Service Commission is hereby authorized to seek penalties against Central Jefferson County Utilities, Inc., pursuant to Section 386.570, RSMo 2000, in the Circuit Court of appropriate venue, for any and all violations of state statutes, Commission Rules, or the Company's tariff provisions as identified in the body of this order.

6. The General Counsel of the Missouri Public Service Commission shall file its action seeking penalties before the effective date of this order.

7. The General Counsel of the Missouri Public Service Commission is further authorized to file a complaint action against Central Jefferson County Utilities, Inc., as described in the body of this order. Should the General Counsel elect to pursue a complaint, it shall file that action before the effective date of this order.

The Commission emphasizes that none of the findings of fact delineated in its February 8, 2007, Report and Order were disturbed by the judgment of the Circuit Court of Cole County when it issued its decision in the Writ of Review of Case No. SO-2007-0071, Circuit Court Docket 07AC-CC00444, Judgment issued June 30, 2008.

IT IS ORDERED THAT:

1. The Commission amends and corrects its February 8, 2007 Report and Order in this matter as fully described in the body of this order.

2. This order shall become effective on September 26, 2008.

3. This case shall be closed on September 27, 2008.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

Harold Stearley, Senior Regulatory Law Judge

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NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Trigen-Kansas City Energy Corporation's Tariffs to Increase Rates for Customers of its Steam Service

Case No. HR-2008-0300

Issue Date: September 18, 2008

Steam §20. The Commission approved the unanimous stipulation and agreement effectively creating a 20.5 percent increase in rates for all classes, adding demand based billing provisions for larger customers in addition to its usage-based billing provisions, eliminating Vacant Building Rider and Alternate Heating Source tariffs, and adopting a new Interruptible Heating Service tariff.

Rates §107. The Commission approved the unanimous stipulation and agreement effectively creating a 20.5 percent increase in rates for all classes, adding demand based billing provisions for larger customers in addition to its usage-based billing provisions, eliminating Vacant Building Rider and Alternate Heating Source tariffs, and adopting a new Interruptible Heating Service tariff.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT AND AUTHORIZING TARIFF FILING

Syllabus: This order approves the Stipulation and Agreement executed by TrigenKansas City Energy Corporation ("Trigen"), the Staff of the Missouri Public Service Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), Kansas City Power and Light Company ("KCPL"), the City of Kansas City ("Kansas City") and the County of Jackson, Missouri ("Jackson County") to resolve all pending issues in this matter. The order also rejects Trigen's initial tariff filing, and authorizes Trigen to file tariffs in compliance with the Stipulation and Agreement.¹

I Procedural History

A. Tariff Filings and Company Overview

On March 11, 2008,² Trigen submitted to the Missouri Public Service Commission certain proposed tariff sheets, i.e. Tariff File Tracking

¹ All citations to the record evidence in this order reference exhibits admitted without objection as is further elucidated in Section II(D) of this order, entitled: "Proposed Effective Date and Testimony Received Into Evidence."

² All dates throughout the remainder of this order refer to the year 2008 unless otherwise specified.

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Nos. YH-2008-0553 and YH-2008-0554.³ The purpose of the filings, according to Trigen, was to implement a general rate increase for steam heat service to customers in its Missouri service area.

Trigen owns and operates the district steam system located in the central business district of the City of Kansas City.⁴ Steam, as well as a significant amount of electricity, is produced at Trigen's Grand Avenue Station in a combined heat and power (cogeneration) process.⁵ Trigen distributes steam through a network of approximately 6.5 miles of pipe buried under the streets of Kansas City.⁶ At the present time, Trigen delivers and sells that steam to approximately 56 retail customers, principally for space heating purposes.⁷ The steam is also used by Trigen's customers to humidify buildings, heat domestic water and, to a lesser extent, in food service applications.⁸ Trigen's retail customers include commercial and governmental office buildings, hotels and owners/managers of multi-unit residential buildings.⁹

Trigen has not sought any increase in rates for operational costs

³ Trigen is the surviving entity resulting from KCPL's divestment of its steam system serving downtown Kansas City in 1990. Exh. 3, Kirk Direct, p. 4. Trigen is currently a subsidiary company of Thermal North America, Inc. ("TNAI"), which is in turn, a management company owned by Veolia Energy North American Holdings, Inc. ("VENAH"). VENAH's parent company, Veolia Environnement, is the largest owner of district energy companies in the world. Exh. 1, Abbott Direct, pp. 1-3.

Trigen is a "heating company," and a "public utility" as those terms are defined in Sections 386.020(20), RSMo 2000 and 386.020(42), RSMo 2000, respectively (All statutory references throughout this order refer to RSMo 2000 and its supplements). Consequently, Trigen is subject to the jurisdiction, control and supervision of the Commission. The Commission has jurisdiction over Trigen's services, activities, and rates pursuant to Sections 386.250 and 393.290.

⁴ Exh. 3, Kirk Direct, pp. 8-12. Trigen's service territory is largely confined to the downtown loop or central business district of Kansas City, MO. Stated another way, Trigen's services are available in the area roughly defined as being within the 1-35/1-70/1-670 highway loop; plus the River Market district; plus a four-block wide extension from the southeast edge of the loop to the "Hospital Hill" area. This latter area was appended to Trigen's service territory in 2006 pursuant to this Commission's ruling in Case No. HA-2006-0294. *Id.*

⁵ Exh. 3, Kirk Direct, pp. 8-12. Trigen's steam production plant is located in the River Market district at 115 Grand Avenue. Bituminous coal from seams in the Missouri/Kansas and Illinois Basin regions is the primary fuel source, and natural gas is the secondary fuel source. Steam production capacity at Grand Avenue is greater than 1.2 million lbs/hour, and is delivered from the four boilers on site. Roughly half of this capacity is capable of being fueled by coal. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

since it acquired the system in 1990.¹⁰ Trigen states that the proposed steam heat rates submitted in its application are designed to produce an additional \$1,228,000 in gross annual revenues, exclusive of applicable gross receipts and sales taxes, or an approximate 19.5%¹¹ increase over existing steam heat service revenues.¹² The tariff sheets attached to Trigen's pleading bore an issue date of March 11, and were proposed to become effective on April 11.¹³ Together with its proposed tariff sheets and other minimum filing requirements, Trigen also filed prepared direct testimony in support of its requested rate increase.

B. Suspension Orders, Interventions, and Procedural Schedule

So the Commission would have sufficient time to study the effect of the proposed tariffs and to determine if they were just, reasonable, and in the public interest, the Commission decided that it must suspend Trigen's tariffs. Consequently, on March 12, the Commission suspended the effective date of the proposed tariffs for 120 days plus an additional six months to allow for a hearing on the matter, or until February 9, 2009.¹⁴ The Commission also issued notice and set a deadline for intervention requests for no later than April 1.¹⁵ Intervention was granted to KCPL, Kansas City and Jackson County.¹⁶

On April 24, the parties jointly filed a proposed procedural schedule culminating with an evidentiary hearing to be held on October 20-24 and 27-31.¹⁷ The proposed schedule was adopted and subsequently modified to eliminate the days of October 30-31 from the hearing schedule.¹⁸

C. Test Year and True-up

¹⁰ Exh. 3, Kirk Direct, p. 4. Trigen had filed a rate increase request in the early 1990's; however, it withdrew that request. Exh. 3, Kirk Direct, p. 4; Exh. 11A, Staff Report: Cost of Service, p. 3 (N P).

¹¹ In the Stipulation and Agreement, the parties had determined that the amount requested represented and approximate increase of 20.5% in Trigen's Gross annual steam tariff revenues.

¹² Letter from Trigen (Brian P. Kirk, Vice-President and General Manager) to Judge Dale, dated March 11, 2008; Exh. 3, Kirk Direct, p. 5.

¹³ See Tariff Tracking Nos. YH-2008-0553 and YH-2008-0554.

¹⁴ See Section 393.150, RSMo 2000; EFIS Docket No. 9, *Order Directing Notice, Suspending Tariff, Setting Hearings, and Directing Filings*, Issued March 12, 2008. (EFIS is the Commission's Electronic Filing and Information System).

¹⁵ EFIS Docket No. 9, *Order Directing Notice, Suspending Tariff, Setting Hearings, and Directing Filings*, Issued March 12, 2008.

¹⁶ EFIS Docket Nos. 15 and 22, issued April 14, 2008 and May 12, 2008, respectively.

¹⁷ Transcript, Volume 2.

¹⁸ EFIS Docket No. 17, *Order Adopting Procedural Schedule and Test Year*, issued April 28, 2008, and EFIS Docket No. 28, *Order Modifying Procedural Schedule*, Issued June 24, 2008.

The test year is a central component in the ratemaking process. A historical test year is usually used because the past expenses of a utility can be used as a basis for determining what rate is reasonable to be charged in the future.¹⁹

The parties agreed to a test year consisting of the calendar year of 2006.²⁰ The parties further agreed that if an anticipated customer addition was completed in time to gather a month's worth of that customer's data that no true-up hearing would be necessary. The Commission found the proposed test year recommended by parties to be suitable and it was adopted by order.²¹ Because the parties had not solidified their positions regarding true-up prior to the evidentiary hearing, the Commission reserved dates for a true-up hearing.

II. Stipulation and Agreement

On September 9, prior to hearing, the parties jointly filed a Stipulation and Agreement ("Agreement") that purports to resolve all issues in this matter.²² All of the parties are signatories to the Agreement. The parties also jointly request the Commission to approve the Agreement subject to the specific terms and conditions in the Agreement and to authorize Trigen to file tariff sheets in conformance with the specimen tariff sheets attached to the Agreement as Appendix A.

A. Annual Revenue Requirement

The Agreement provides that Trigen should be authorized to file revised tariff sheets containing new rate schedules for steam heat service designed to produce an increase in Trigen's overall Missouri jurisdictional gross annual steam heat service revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, in the amount of \$1,228,000 annually. This represents an approximate increase of 20.5% in Trigen's gross annual steam tariff revenues and is 100% of the amount requested by the company.²³

B. Rate Design/Rate Structure/Rate Classes

The rate design/rate structure/rate classes agreed to among the parties reflect a change in Trigen's rate design/rate structure/rate classes to

¹⁹ See *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 59 (Mo. banc 1979).

²⁰ EFIS Docket No. 16, *Jointly Proposed Procedural Schedule & Recommendations Regarding Test Year, True-Up, & Local Public Hearings*, filed April 24, 2008.

²¹ EFIS Docket No. 17, *Order Adopting Procedural Schedule and Test Year*, issued April 28, 2008.

²² EFIS Docket No. 47, Exh. 15, *Stipulation and Agreement*, filed September 9, 2008.

²³ Appendix A of the Agreement contains revised specimen tariff sheets designed to implement the rate increase.

(1) increase rates by the same percentage (20.5%) for all classes; (2) add demand based billing provisions for its larger customers in addition to its usage-based billing provisions; (3) eliminate its Vacant Building Rider and Alternate Heating Source tariffs; and (4) adopt a new Interruptible Heating Service tariff.²⁴

C. Other Provisions and Tariff Changes

The Agreement recommends the Commission: (1) adopt certain depreciation rates; (2) make a finding that Trigen has complied with the requirements of Case No. HM-2004- 0618 regarding the correction and restatement of its plant-in-service and accumulated depreciation reserve; (3) require Trigen to develop and implement an expansion of its current time reporting system to capture labor hours and allow the recording of labor costs by detailed operating and maintenance expense account; (4) require a specific accounting schedule for Kansas City and Jackson County for each of the first twelve months subsequent to the "Tariff Effective Date,"²⁵ and (5) require Trigen to file a class cost of service study as part of its next general rate case and file that general rate case no later than five years from the effective date of the rates implemented in this case.

The parties also agree that Trigen should be authorized to file with the Commission revised tariff sheets to implement certain other changes in its tariffs. These changes include revisions to the tariff language concerning interest on customer deposits, changes concerning estimation of bills, changes to reflect the changes which have been made to the rates, and changes to correct errors in Trigen's existing tariffs. The parties further assert the Commission should authorize Trigen to adopt the reserve reallocation(s) as set forth in Column 9 of Appendix 3 to the Staff Report on Cost of Service filed in this case by Staff.²⁶

D. Proposed Effective Date and Testimony Received Into Evidence

The parties have agreed to a goal of a November 1 for the effective date for the tariff sheets agreed to in the Agreement. The parties also agree that, unless called by the Commission to respond to questions, in the event the Commission approves this Agreement without

²⁴ These changes are embodied in the specimen tariff sheets attached to Agreement as Appendix A.

²⁵ If the City's and/or County's annual aggregate bill for all accounts increased by more than 20.5%, the amount over 20.5% will be refunded (in this or any subsequent rate case, all other customers will be held harmless from any resulting refund pursuant to this provision).

²⁶ Exh. 11A (NP) and 11 B (HC).

modification or condition, the prefiled testimony (including all exhibits, appendices, schedules, etc. attached thereto) and reports of all witnesses in this proceeding shall be received into evidence without the necessity of those witnesses taking the witness stand.

E. Contingent Waiver of Rights

If Commission accepts the specific terms of the Agreement, then unless otherwise explicitly provided in the Agreement, none of the parties to the Agreement shall be deemed to have approved, accepted, agreed, consented or acquiesced to any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation or revenue-related methodology, cost of capital methodology or capital structure, rate design principle or methodology, or depreciation principle or methodology, and except as explicitly provided herein, none of the Parties shall be prejudiced or bound in any manner by the terms of this Agreement (whether this Agreement is approved or not) in this or any other proceeding, other than a proceeding limited to enforce the terms of this Agreement.

The parties further agreed that if Commission accepts the specific terms of the Agreement without condition or modification, they would waive their respective rights to: (1) call, examine, and cross-examine witnesses pursuant to § 536.070(2); (2) present oral argument and written briefs pursuant to Section 536.080.1; (3) the reading of the transcript by the Commission pursuant to Section 536.080.2; (4) seek rehearing, pursuant to Section 536.500; and, (5) judicial review pursuant to Section 386.510.²⁷

F. Objections to the Stipulation and Agreement

Commission Rule 4 CSR 240-2.115, governing stipulations and agreements, allows seven days following the filing on a non-unanimous agreement for any party to file an objection to the agreement. As previously noted, all parties to this action are signatories to the Stipulation and Agreement making it unanimous, and no party has filed any objection to the agreement, in whole or in part, since its filing. Additionally, no party has requested a hearing concerning the Agreement. Consequently, on September 17, the Commission suspended the remainder of the procedural schedule set in this matter and will render a decision expeditiously regarding approval of the Agreement.

The Commission shall admit, without modification or condition, the prefiled testimony (including all exhibits, appendices, schedules, etc.

²⁷ All statutory references throughout this order are to RSMo 2000 unless otherwise noted.

attached thereto), all reports of all witnesses and a copy of the Agreement into evidence. A copy of the exhibits list will be attached to this order and the Commission will cite references to those exhibits throughout this order.

III. Rate Making Standards and Practices

The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,²⁸ subject to judicial review of the question of reasonableness.²⁹ A "just and reasonable" rate is one that is fair to both the utility and its customers;³⁰ it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."³¹ In 1925, the Missouri Supreme Court stated:³²

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally

²⁸ Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

²⁹ *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

³⁰ *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

³¹ *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

³² *Id.*

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the sole provider of a public necessity.³³ “[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental.”³⁴ However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.³⁵ “There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment.”³⁶

The Commission has exclusive jurisdiction to establish public utility rates,³⁷ and the rates it sets have the force and effect of law.³⁸ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;³⁹ neither can a public utility change its rates without first seeking authority from the Commission.⁴⁰ A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission’s.⁴¹ Thus, “[r]atemaking is a balancing process.”⁴²

Ratemaking involves two successive processes.⁴³ first, the determination of the “revenue requirement,” that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.⁴⁴ The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue

³³ *May Dep’t Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

³⁴ *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm’n*, 179 S.W.2d 123, 126 (1944).

³⁵ *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

³⁶ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. 1981).

³⁷ *May Dep’t Stores*, 107 S.W.2d at 57.

³⁸ *Utility Consumers Council*, 585 S.W.2d at 49.

³⁹ *Id.*

⁴⁰ *Deaconess Manor Ass’n v. Pub. Serv. Comm’n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

⁴¹ *May Dep’t Stores*, 107 S.W.2d at 50.

⁴² *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm’n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

⁴³ It is worth noting here that Missouri recognizes two distinct ratemaking methods: the “file-and-suspend” method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility’s rates are not just and reasonable. See *Utility Consumers Council*, 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm’n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976).

⁴⁴ *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm’n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

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requirement is usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.⁴⁵ The calculation of revenue requirement from these four factors is expressed in the following formula:

$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;
C = Prudent Operating Costs, including
Depreciation Expense and Taxes;
V = Gross Value of Utility Plant in Service;
D = Accumulated Depreciation; and
R = Overall Rate of Return or Weighted Cost of
Capital.

The return on the rate base is calculated by applying a rate of return; that is, the weighted cost of capital applied to the original cost of the assets dedicated to public service, less accumulated depreciation.⁴⁶ The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility's books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility's prudent operating costs. Section 393.290 authorizes the Commission to value the property of every steam heat corporation operating in Missouri, that is, to determine the rate base. Sections 393.240 and 393.290 authorize the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

The equation set out above shows that the Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a rate of return. For any utility, its fair rate of return is simply its composite cost of capital.⁴⁷ The composite cost of

⁴⁵ *Id.*, citing Colton, "Excess Capacity: Who Gets the Charge From the Power Plant?," 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).

⁴⁶ See *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, at Footnote Number 42.

⁴⁷ Staff Exh. 4, Cost of Service Report, p. 10. "From a financial viewpoint, a company employs different forms of capital to support or fund the assets of the Company. Each different form of capital has a cost and these costs are weighted proportionately to fund each dollar invested in

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capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized.⁴⁸ The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task.⁴⁹ In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁵⁰

In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical

the assets. Assuming that the various forms of capital are within a reasonable balance and are valued correctly, the resulting total [Weighted Average Cost of Capital] WACC, when applied to rate base, will provide the funds necessary to service the various forms of capital. Thus, the total WACC corresponds to a fair of return for the utility company." *Id.*

⁴⁸ See Phillips, *The Regulation of Public Utilities*, Public Utilities Reports, Inc., p. 394 (1993).

⁴⁹ *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

⁵⁰ *Bluefield*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.⁵¹

The Court restated these principles in *Hope Natural Gas Company*, the latter of the two cases:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.⁵²

M. Legal Standard for Approving Stipulations and Agreements

The Commission has the legal authority to accept a Stipulation and Agreement as offered by the parties as a resolution of issues raised in this case.⁵³

In reviewing the agreement, the Commission notes:
Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.⁵⁴

* * *

Consequently, the Commission need not make either findings of fact or

⁵¹ *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L. Ed. at 1182-1183.

⁵² *Hope Nat. Gas Co.*, *supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

⁵³ Section 536.060, RSMo Cum. Supp. 2006. See also Commission Rule 4 CSR 240-2.115(1)(B), which states that the Commission "may resolve all or any part of a contested case on the basis of a stipulation and agreement."

⁵⁴ Section 536.090, RSMo Cum. Supp. 2006. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App. 1998).

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conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.⁵⁵ While there is no question the Commission must comply with its statutory mandates to set just and reasonable rates by determining the appropriate revenue requirement and rate design, since no proper party has requested a hearing in this case, the Commission may make its determination, and if appropriate, grant the relief requested based on the Agreement.

As noted, no proper party requested a hearing in this matter, and while the Commission is not required to make findings of fact or conclusions of law in an order regarding a stipulation and agreement, the Commission will take note of the relevant and undisputed facts and draw appropriate legal conclusions when reaching its decision.

V. Discussion

A. Revenue Requirement

According to Staff's Direct Accounting Schedules and Class Cost of Service Summary, Trigen's rate base is calculated to be \$17,571,902.⁵⁶ Prior to entering into the Agreement, Staff's proposed Rate of Return ("ROR") on rate base for Trigen ranged as follows: 7.66 (Return on Equity ("ROE") of 9.25), 7.72% (ROE 9.38%) and 7.78% (ROE of 9.50%).⁵⁷ Staff utilized a cost of service ratemaking approach to develop this weighted cost of capital range for Trigen's steam operations.⁵⁸ Staff's calculations utilizing its recommended ROR on their calculated rate base resulted in a recommendation for the Commission to approve a total gross annual increase in revenue requirement for Trigen ranging from \$2,071,641

⁵⁵ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

⁵⁶ Exh. 10, Staff Accounting Schedules, Schedule 2-1.

⁵⁷ Exh. 10, Staff Accounting Schedules, Schedule 1-2.

⁵⁸ Exh. 11 A., Staff Report: Cost of Service (N P), pp. 5-10. Staff stated in its Cost of Service Report: "Because Staff accepts the upper end of Mr. Hill's recommended cost of common equity range based on his proxy group, Staff will not, at this time, include all the details normally included in its cost of common equity direct filing. Staff's workpapers in this case include the schedules Staff would normally attach to its direct filing. These workpapers support Mr. Hill's recommended cost of common equity. Because Staff found it appropriate to use the proxy group's capital structure for ratemaking purposes, Staff had to estimate a cost of debt to apply to the debt ratio in this case. Attached to this report are schedules that provide the derivation of this debt cost estimate." *Id.* at p. 6. Staff typically utilizes the Discounted Cash Flow and Capital Pricing Asset Models when making its calculations and has apparently relied upon Trigen's witness Hill' calculation utilizing these methods.

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to \$2,105,569.⁵⁹

In prior cases, the Commission has recognized a range of reasonableness for the return on equity as being 100 basis points, plus or minus, the national average.⁶⁰ Staff, recognizing the Commission's need to consider average authorized returns, stated the following:⁶¹

To Staff's knowledge there are no sources that publish authorized returns for steam operations. However, because natural gas distribution companies have been used as a proxy for estimating the ROR for Trigen Kansas City's operations, it is reasonable to review recent authorized returns for the regulated natural gas distribution industry.

According to the Regulatory Research Associates (RRA), the average authorized ROE for natural gas distribution companies for 2007 was 10.24 percent based on 37 decisions (first quarter – 10.44 percent based on 10 decisions; second quarter – 10.12 percent based on 4 decisions; third quarter – 10.03 percent based on 8 decisions; and fourth quarter, 10.27 percent based on 15 decisions).

The average authorized ROE for natural gas distribution companies for 2008 year-to-date was 10.35 percent based on 9 decisions (first quarter – 10.38 percent based on 7 decisions; and second quarter – 10.25 percent based on 2 decisions).

Although average authorized ROEs tend to garner the most attention in rate cases, it is also important to consider average authorized rates of return (ROR) to provide some context for average authorized ROEs. Some companies' costs of debt may cause their ultimate authorized return to be somewhat higher than the average. Although the cost of debt is only adjusted in extraordinary circumstances (for instance in Aquila Inc.'s recent rate cases, the cost of debt had been adjusted to make it consistent with investment grade costs), there may be concerns about the reasonableness of these costs. Because it is the overall ROR (not the quoted average authorized ROE) that is applied to rate base to determine the revenue requirement, it would appear that this average would also be important in testing the reasonableness of the total cost of capital.

The average authorized ROR for natural gas utilities in 2007 was 8.12

⁵⁹ Exh. 10, Staff Accounting Schedules, Schedule 1-1.

⁶⁰ *In re Missouri American Water Co.* 2007 WL 4386054, Mo.P.S.C.; *In re Union Elec. Co.*, 257 P.U.R.4th 259, 2007 WL 1597782, Mo.P.S.C.; *In re Aquila, Inc.*, 257 P.U.R.4th 424, 2007 WL 1663103, Mo.P.S.C.; *In re Kansas City Power & Light Co.*, 2007 WL 750149, Mo.P.S.C.; *In re Empire Dist. Elec. Co.*, 2006 WL 3848081, Mo.P.S.C.; *In re Kansas City Power & Light Co.*, 2006 WL 4041675, Mo.P.S.C..

⁶¹ Exh. 11A., Staff Report: Cost of Service (NP), pp. 8-10.

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percent based on 32 decisions (first quarter – 8.40 percent based on 10 decisions; second quarter – 8.32 percent based on 3 decisions; third quarter – 7.88 percent based on 7 decisions; fourth quarter – 7.97 percent based on 12 decisions).

The average authorized ROR for natural gas utilities for 2008 was 8.65 percent based on 9 decisions (first quarter – 8.78 percent based on seven decisions; second quarter – 8.22 percent based on two decisions).

It is important to note that Staff has not researched the specifics of the cases cited in the RRA reports.

Trigen, maintains that its calculations support a revenue deficiency of approximately \$2.6 million.⁶² Applying the Discounted Cash Flow and the Capital Asset Pricing Models, adjusted for increased financial risk the company believes exists in its market, Trigen's subject matter expert recommended a return on equity of 10.0%.⁶³ Regardless, Trigen is only requesting an increase in its annual revenues of \$1,228,000.⁶⁴

Trigen's witness, Brian P. Kirk, Vice President and General

⁶² According to Trigen witness Carver, Trigen utilized a "revenue crediting approach" for purposes of its calculations. Exh. 5, Carver Direct, p. 13. The Company has proposed the revenue crediting approach in this proceeding for several reasons. First, Trigen has never processed a steam rate case since Kansas City Power & Light Company divested its steam property in the early 1990's. Second, the assembly of this rate case filing was a major undertaking for the Company at a time when significant developments in downtown Kansas City demanded attention. Third, the revenue crediting methodology mitigates a significant portion of the overall revenue requirement without the need to commit significant resources to conduct detailed cost assignment and allocation studies and analyses. *Id.*

⁶³ Exh. 6, Hill Direct.

The annual form of the **DCF method** of calculating a fair return on common equity can be expressed algebraically by this equation:

$$k = D1/PS + g$$

where: k is the cost of equity;

g is the constant annual growth rate of earnings, dividends and book value per share;

D1 is the expected next period annual dividend; and

PS is the current price of the stock.

The **CAPM** describes the relationship between a security's investment risk and its market rate of return. This relationship identifies the rate of return that investors expect a security to earn so that its market return is comparable with the market returns earned by other securities that have similar risk. The general form of the CAPM is as follows:

$$k = Rf + \beta (Rm - Rf)$$

where: k = the expected return on equity for a specific security;

Rf = the risk-free rate;

R = beta; and

Rm - Rf = the market risk premium.

See *In re Missouri American Water Co.* 2007 WL 4386054, Mo.P.S.C., October 4, 2007.

⁶⁴ Exh. 3, Kirk Direct, p. 5; Exh. 5, Carver Direct, p. 4.

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Manager of the company, provides several reasons for requesting an increase in revenue below Staff's recommended range and its own calculations of its revenue deficiency. Witness Kirk opined:⁶⁵

Trigen's rate case filing supports a calculated revenue deficiency of about \$2.6 million. Trigen is requesting, and the new tariffs filed by Trigen would result in a more modest rate increase of \$1,228,000. The Company has not filed tariffs seeking to increase rates to cover the entire calculated revenue deficiency. Trigen thinks it is prudent to limit the amount of the rate change we are imposing on our business customers through this rate proceeding for several reasons.

First, it has been eighteen years since Trigen's steam tariff rates were changed. During that period, the organization and ownership of Trigen-Kansas City has changed several times. Trigen's existing book depreciation rates were authorized by the Commission in the late 1980's, when the steam distribution system and the steam production facilities were owned by KCPL. We are proposing to change those depreciation rates for the first time in twenty years. As the Commission is well aware, under prior ownership, the Company inadvertently overlooked the regulatory requirement that our plant accounting must conform to net original cost at the time of our purchase of the steam properties in 1990. Over the last several years, the Company has committed resources to correct that deficiency and now maintains its accounting records on a net original cost basis. Furthermore, the Company agreed to maintain its accounting records in conformance with the FERC uniform system of accounts, rather than the system we inherited from prior owners.

Second, we also identified a need to modernize our tariff structure and related billing determinants. In the most recent two to three years, Trigen's customer load, steam sales and revenues have grown dynamically compared to the fifteen preceding years of Trigen's history. The cumulative effect of these changes on our plant and system are still in the process of being assimilated, and in fact the growth in load and revenue continues to be dynamic. In light of this, Trigen decided it was wise to move more moderately on cost recovery and structural change to rates. The changed rate structure as modeled accordingly recovers significantly less than the calculated revenue deficiency, as noted above. This approach is intended to provide flexibility in integrating the effect of these various changes into Trigen's first Missouri rate case in the Company's history.

⁶⁵ Exh. 3, Kirk Direct, p. 5-7.

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Third, we continue to work on other strategies (e.g., efforts to reduce costs, add new customers, increase sales, etc.) that are expected to produce future benefits and further mitigate our need for rate relief. Rather than rely on our existing regulated customers as the first source of covering our earnings shortfall, it has been and continues to be our goal and objective to implement additional strategies before seeking additional rate relief beyond our pending filing. We have had success on these fronts in recent years, increasing annual revenues since 2005 by an expected \$7 million once Truman Medical Center achieves full year results. We are optimistic that continuing success with these pro-active measures will in itself serve to further reduce the earnings shortfall of their own accord, and with reduced need for future regulated rate relief.

Unlike many other regulated services, Trigen must compete with other available options for 100% of the heating service it provides to its customers. Trigen is therefore limiting its rate increase to moderate the impact on customers and maintain its customer base, ultimately to the benefit of all ratepayers. With all of our customers having other options for space heating supply, we want to do what we reasonably can to retain them. We would like to point out, however, that Trigen may find it necessary in some future rate proceeding to seek recovery of its full revenue deficiency. However, any subsequent rate proceeding would be commenced with an eye towards maintaining a high level of customer value and provision of service that is competitive with the offerings of our rivals. Obviously, any future rate relief sought by Trigen would be based on a new test year.

In the Agreement, the parties did not specifically agree to a rate base, rate of return or return on equity, but rather developed the request for approval of a \$1,228,000 increase in base rates based upon negotiation.⁶⁶ The revenue amounts embodied in the Agreement are exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar taxes.⁶⁷

Because the parties are agreeing to a revenue increase below Staff's recommended rate of return, below the company's calculated revenue deficiency and below the national averages provided by Staff, the Commission must take into consideration Trigen's reasons for requesting a rate of return below its costs. The Commission notes there is no evidence in the record establishing any anticompetitive motivation on the part of

⁶⁶ Exh. 15, *Stipulation and Agreement*.

⁶⁷ *Id.*, p. 2.

Trigen and no objection by any of the parties to requested increase. The Commission further determines that the concern of “rate shock” that exists after some eighteen years of no rate increases justifies Trigen’s moderate plan for cost recovery and structural change to rates.⁶⁸

B. Rate Design

Trigen and Staff began this case with differing proposals of rate design.⁶⁹ Ultimately, the signatory parties to the Agreement agreed to a change in Trigen’s rate design/rate structure/rate classes to (1) increase rates by the same percentage (20.5%) for all classes; (2) add demand based billing provisions for its larger customers in addition to its usage-based billing provisions; (3) eliminate its Vacant Building Rider and Alternate Heating Source tariffs; and (4) adopt a new Interruptible Heating Service tariff.⁷⁰ The Agreement also requires Trigen to file a class cost of service study as part of its next general rate case and file that case no later than 5 years from the effective date of the rates implemented in this case.⁷¹ The Commission finds this approach helps to maintain the status quo, and equalize the effects of the overall rate increase across the appropriate classes of customers. The requirement for the filing of a new class cost of service study within five years will allow additional evaluation and further the maintenance of the appropriate rate design.

C. Miscellaneous Issues Addressed by the Agreement

The Agreement contains several additional tariff revisions, the setting of depreciation rates and various other accounting and recording provisions that have been previously listed in this order. In light of the unanimous Agreement by the parties and no evidence to indicate anything objectionable about these conditions, the Commission finds these provisions of the Agreement to be reasonable.

VI Conclusions

This case illustrates one of the most important public policy

⁶⁸ See the Commission’s discussion and conclusions of law regarding “rate shock” in Case Number WR2000-281, *In the Matter of Missouri-American Water Company’s Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order on Second Remand, Paragraph 9, pp. 12-13, effective December 14, 2007. It is within the province of the Commission to determine the methodology used for ratemaking. *Missouri Gas Energy v. Mo. PSC*, 978 S.W.2d 434,440 (Mo. App. 1998); *State ex. rel. Associated Natural Gas v. Mo. PSC*, 706 S.W.2d 870, 880-82 (Mo. App. 1985).

⁶⁹ Exh. 12, Staff Report: Rate Design and Miscellaneous Tariff Issues.

⁷⁰ Exh. 15. *Stipulation and Agreement*, p. 2. These changes are embodied in the specimen tariff sheets attached to Agreement as Appendix A.

⁷¹ *Id.* at p. 6.

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questions faced by this Commission: What is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers, especially those with fixed or low incomes, and ensuring that utilities have the necessary cash flow to operate their businesses, maintain their infrastructures, and have an opportunity to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure?⁷² As already noted, both of these objectives are statutory duties of this Commission.

A. Revenue Requirement

The record reflects that Trigen has not received any increase in rates for operational costs over the rates established when it acquired the production and distribution system in 1990. The record reflects that regardless of the accounting approach utilized, Trigen is operating with a significant revenue deficiency. Trigen's moderate request for a revenue increase below its deficiency is reasonable under the circumstances and will serve the public interest.

The Agreement resulted from extensive negotiations between parties with diverse interests and the Commission's neutral Staff. The parties agreed that the rates set out in the specimen tariff sheets attached to the Agreement are just and reasonable.⁷³

The Commission further notes that no party to this action has objected to the annual revenue requirement, or to any component of any calculations, negotiations or compromise resulting in the annual revenue requirement as set forth in the Agreement. No party has contested this revenue requirement or demonstrated any inefficiency or improvidence on the part of Trigen to challenge the justification of this increase in its revenue requirement. No party requested a hearing on any issue related to the determination of the annual revenue requirement,

The Commission concludes that increasing Trigen's base rates by \$1,228,000 results in a just and reasonable revenue requirement for Trigen that is fair to both the utility and its customers. This revenue requirement is concluded to be no more than is sufficient to keep Trigen's utility plants in proper repair for effective public service, and insure to Trigen's investors a reasonable return upon funds invested. The Commission shall approve the Agreement as to Trigen's annual revenue requirement, in all respects, as encompassed in the Agreement.

B Rate Design

⁷² See generally, Section 386.610.

⁷³ Exh. 15, *Stipulation and Agreement*.

No party has objected to any Class Cost of Service allocation factors or any other billing determinants utilized for the purpose of determining rate design in the Agreement. No party objected to any component of any calculations, negotiations or compromise resulting in determining the rate design as set forth in the Agreement. The Commission concludes the rate design in the Agreement is just and reasonable and is fair to both the utility and its customers. No party requested a hearing on any issue related to the determination of the rate design. The Commission shall approve the Agreement as to rate design, in all respects, as encompassed in the Agreement.

C. Miscellaneous Tariff Provisions

After reviewing the remainder of the items encompassed in the Agreement, as outlined above, and the parties' positions on, or lack of position on, those items, the Commission finds the proposed items to be reasonable as adjunctive provisions of the Agreement. No party has objected to the miscellaneous tariff provisions, or to any component of any calculations, negotiations or compromise resulting in determining the miscellaneous tariff provisions as set forth in the Agreement. No party requested a hearing on any issue related to the determination of the miscellaneous tariff provisions as set forth in the Agreement.

These remaining items proposed in the Agreement are acceptable to all concerned parties as evidenced by these parties being signatories to the Agreement and having not objected to these items.⁷⁴ The Commission shall approve all of the miscellaneous tariff provisions as encompassed in the Agreement.

VII. Final Decision

Based on the agreement of the parties and the testimony of the parties' witnesses, the Commission finds that the parties have reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service. Accordingly, the specimen tariff sheets attached to the Stipulation and Agreement are just and reasonable. The Commission shall authorize Trigen to file tariffs in compliance with the Agreement. The parties shall be directed to comply with the terms of the Agreement.

The revised tariff sheets to be filed shall be marked with an effective date which is at least 30 days past the issue date. The Commission notes that the parties have agreed to a goal of the tariffs becoming effective no later than November 1, 2008; however, upon motion without objection

⁷⁴ Exh. 15, *Stipulation and Agreement*.

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and upon confirmation that the tariff filings are in compliance with this order and the Agreement, the Commission may expedite the effective date for good cause shown.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed on September 9, 2008, is hereby approved as the resolution of all issues in case number HR-2008-0300. A copy of the Stipulation and Agreement is attached to this order.

2. The signatories to the Stipulation and Agreement are ordered to comply with the terms of the Stipulation and Agreement.

3. The steam heat service tariff sheets, tariff tracking numbers YH-2008-0553 and YH-2008-0554, submitted on March 11, 2008, by Trigen-Kansas City Energy Corporation for the purpose of increasing rates for steam service are hereby rejected.

4. The specific tariff sheets rejected are:

P.S.C. Mo. No. 1

First Revised Sheet No. 1, Cancelling Original Sheet No. 1
First Revised Sheet No. 2, Cancelling Original Sheet No. 2
First Revised Sheet No. 3, Cancelling Original Sheet No. 3
First Revised Sheet No. 4, Cancelling Original Sheet No. 4
Third Revised Sheet No. 5, Cancelling Second Revised Sheet No. 5
Third Revised Sheet No. 6, Cancelling Second Revised Sheet No. 6
Second Revised Sheet No. 7, Cancelling First Revised Sheet No. 7
Third Revised Sheet No. 8, Cancelling Second Revised Sheet No. 8
Second Revised Sheet No. 9, Cancelling First Revised Sheet No. 9
First Revised Sheet No. 10, Cancelling Original Sheet No. 10
First Revised Sheet No. 11, Cancelling Original Sheet No. 11
First Revised Sheet No. 12, Cancelling Original Sheet No. 12
Second Revised Sheet No. 13, Cancelling First Revised Sheet No. 13
First Revised Sheet No. 14, Cancelling Original Sheet No. 14
First Revised Sheet No. 15, Cancelling Original Sheet No. 15
First Revised Sheet No. 16, Cancelling Original Sheet No. 16
First Revised Sheet No. 17, Cancelling Original Sheet No. 17
First Revised Sheet No. 18, Cancelling Original Sheet No. 18

P.S.C. Mo. No. 2

First Revised Sheet No. 1, Cancelling Original Sheet No. 1
First Revised Sheet No. 2, Cancelling Original Sheet No. 2
First Revised Sheet No. 5, Cancelling Original Sheet No. 5
First Revised Sheet No. 8, Cancelling Original Sheet No. 8
Second Revised Sheet No. 9, Cancelling First Revised Sheet No. 9

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First Revised Sheet No. 11, Cancelling Original Sheet No. 11
First Revised Sheet No. 12, Cancelling Original Sheet No. 12
First Revised Sheet No. 15, Cancelling Original Sheet No. 15
First Revised Sheet No. 17, Cancelling Original Sheet No. 17
First Revised Sheet No. 19, Cancelling Original Sheet No. 19
First Revised Sheet No. 21, Cancelling Original Sheet No. 21
First Revised Sheet No. 22, Cancelling Original Sheet No. 22
First Revised Sheet No. 23, Cancelling Original Sheet No. 23
First Revised Sheet No. 25, Cancelling Original Sheet No. 25
First Revised Sheet No. 27, Cancelling Original Sheet No. 27
First Revised Sheet No. 29, Cancelling Original Sheet No. 29
First Revised Sheet No. 30, Cancelling Original Sheet No. 30
First Revised Sheet No. 31, Cancelling Original Sheet No. 31

5. Trigen-Kansas City Energy Corporation is authorized to file tariffs in compliance with the terms of the Stipulation and Agreement.

6. Tariffs filed in accordance with Ordered Paragraph #5 shall be filed with an effective date which is at least 30 days after its issue date; however, Trigen-Kansas City Energy Corporation may seek expedited approval of its tariffs, if such tariffs are in compliance with the Stipulation and Agreement, as described in the body of this order.

7. The Commission authorizes Trigen to adopt the depreciation rates delineated in the Stipulation and Agreement.

8. The Commission concludes that Trigen-Kansas City Energy Corporation has complied with the requirements of Case Number HM-2004-0618 regarding the correction and restatement of its plant-in-service and accumulated depreciation reserve.

9. Trigen-Kansas City Energy Corporation shall file a class cost of service study as part of its next general rate case and file that general rate case no later than five years from the effective date of the rates implemented in this case.

10. The prefiled testimony (including all exhibits, appendices, schedules, etc. attached thereto), all reports of all witnesses and a copy of the Stipulation and Agreement are admitted into evidence. A copy of the exhibits list is attached to this order.

11. The procedural schedule adopted by the Commission on April 28, 2008 and subsequently modified on June 24, 2008, that was suspended on September 17, 2008, is hereby canceled.

12. This order shall become effective on September 26, 2008.

WINSTAR COMMUNICATIONS, LLC

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Davis, Chm., Murray, Clayton, Jarrett, and Gunn, CC., concur.
Stearley, Senior Regulatory Law Judge

***NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

The Office of the Public Counsel v. Winstar Communications, L.L.C.

Case No. TC-2008-0346
Decided September 28, 2008

Telecommunications §1. The Commission cancelled the certificate of service authority after giving notice and receiving no response.

Certificates §1. The Commission cancelled the certificate of service authority after giving notice and receiving no response.

ORDER CANCELLING CERTIFICATE

On August 21, 2008, the Missouri Public Service Commission issued an order directing Winstar Communications, L.L.C. to file a pleading no later than September 10, 2008 stating why the company's certificate of service authority should not be cancelled. Winstar did not respond. The Commission will therefore cancel the company's certificate.

"Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. . . ."¹ With regard to the hearing requirement in this Section, the requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.² Winstar did

¹ Section 392.410.5, RSMo 2000

² *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

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not respond to the Commission's order of August 21. Winstar thus had the opportunity to first respond to the Commission's order, then to request a hearing. The company failed to take that opportunity. The Commission will therefore cancel the company's certificate.

IT IS ORDERED THAT:

1. The certificate of service authority granted to Winstar Communications, L.L.C. is cancelled.
2. This order shall become effective on September 28, 2008.
3. This case shall be closed on September 29, 2008.

(S E A L)

Davis, Chm., Murray, Jarrett, and Gunn, CC., concur.
Clayton, C., dissents.
Jones, Senior Regulatory Law Judge

In the Matter of the Small Company Rate Increase Request of Tri-States Utility, Inc.

Case No. WR-2009-0058

September 29, 2008

Water §16. The Commission approved the proposed tariff sheets after finding them just and reasonable. The Commission also approved the proposed Disposition Agreement and depreciation rates.

Water §20. The Commission approved the proposed tariff sheets after finding them just and reasonable. The Commission also approved the proposed Disposition Agreement and depreciation rates.

**ORDER APPROVING DISPOSITION AGREEMENT,
APPROVING TARIFF AND CLOSING CASE**

On January 31, 2008, Tri-States Utility, Inc. initiated a small company rate increase pursuant to Commission rule 4 CSR 240-3.635. Tri-States requested a rate increase intended to generate an annual increase of \$1,450,000 in its annual water system operating revenues. The proposed revenue represented a 140% increase in the company's

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annual water system operating revenues. The company serves 3,445 customers and informed them of the proposed rate increase. Three hundred eight comments were received. Forty-five of those comments mirrored others.

On August 27, 2008, the company filed proposed tariff sheets with an effective date of September 29. On September 3, the Staff of the Commission filed a unanimous agreement entered into between it, the company and the Office of the Public Counsel. Attachment B of the agreement shows that the company's total operating revenue is \$991,380 but that the total cost of service is \$989,198. This resulted in an agreed-upon decrease of \$2,182 in revenues. As shown in Attachment D to the agreement, the parties also agreed to certain depreciation rates.

In its recommendation, filed on September 12, Staff recommends that the Commission issue an order that: (a) approves the proposed revised tariff sheets; (b) approves the Disposition Agreement; (c) directs the company to comply with the terms of Disposition Agreement; (d) prescribes the schedule of depreciation rates attached to the Disposition Agreement.

The Commission finds the proposed tariff sheets to be just and reasonable and finds that they should be approved for service rendered on or after September 29, 2008. The Commission also finds the depreciation rates proposed by Staff to be just and reasonable and will direct the company to implement them.

IT IS ORDERED THAT:

1. The following tariff sheets filed by Tri-States Utility, Inc. and assigned Tariff File No. YW-2009-0152, are approved for service rendered on or after September 29, 2008:

P.S.C. MO No. 1

Revised Sheet No. 6, Canceling Original Sheet No. 6 Original Sheet No. 6A

2. The Disposition Agreement entered into between Tri-States Utility, Inc., the Staff of the Missouri Public Service Commission and the Office of the Public Counsel is approved.

3. The parties to the Disposition Agreement shall abide by its terms.

4. The depreciation rates attached to the Disposition Agreement as Attachment D are approved and Tri-States Utility, Inc. shall implement them.

5. This order shall become effective on September 29, 2008.

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6. This case shall close on September 30, 2008

Davis, Chm., Murray, Clayton, Jarrett, and Gunn, CC., concur.
Jones, Senior Regulatory Law Judge

NOTE: An Order of Correction was issued in this case on September 19, 2008.

NOTE: The Disposition Agreement in this case has not been published. If needed, the document is available in the official case files of the Public Service Commission.

In the Matter of the Staff of the Missouri Public Service Commission's Request for an Appointment of an Interim Receiver and for an Order Directing the General Counsel to Petition the Circuit Court of Phelps County for the Appointment of a Receiver for Gladlo Water & Sewer Company, Inc.*

*Case No. WO-2009-0086
Decided: September 18, 2008*

Water §1. The Commission determined that the Gladlo Water & Sewer Company had effectively abandoned its water system in Phelps County, Missouri. Gladlo failed to respond to a notice of petition for appointment of a receiver, so the Commission entered an order granting default.

ORDER GRANTING DEFAULT

On September 3, 2008, the Staff of the Commission filed the above-styled petition. Staff claims that Gladlo Water & Sewer Company (hereafter "Gladlo") has effectively abandoned its water system in Phelps County, Missouri. Therefore, Staff asked for expedited treatment of its petition for an order directing the Commission's General Counsel to petition the Circuit Court of Phelps County for the appointment of a receiver.

The Commission gave Gladlo notice of the petition on September 8, and informed Gladlo it had until September 15 to answer the petition.¹ Gladlo failed to respond.

Commission Rule 4 CSR 240-2.070(9) provides that if a respondent fails to timely respond to a complaint, the Commission may

¹ As permitted by Commission Rule 4 CSR 240-2.080(15), the Commission shortened Gladlo's time to answer the petition from 10 days to 7, due to Staff's Motion for Expedited Treatment.

*A receiver was appointed by the Circuit Court of Phelps County in 09PH-CU00116.

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deem the complaint admitted, and may enter an order granting default.² Because Gladlo failed to respond, the Commission finds it in default and finds that Staff's allegations are deemed admitted.

Therefore, the Commission makes the following findings.³

1) Gladlo is a public utility, water corporation and sewer corporation as defined in Section 386.020,

2) Gladlo it is providing water service to fewer than 8,000 customers in the Whispering Pines Subdivision in Phelps County, Missouri.

3) The Missouri Secretary of State has administratively dissolved Gladlo due to Gladlo's failure to file its 2007 annual registration report.

4) Gladlo has failed to pay its 2008 annual assessment to the Commission.

5) Gladlo has not sent bills to customers for payment of water services for the last four months, and Gladlo has not received income for that same time period to manage its costs, and will soon be insolvent.

6) Gladlo has not paid its electric bill for several months, thus endangering its ability to operate its well pump.

7) Gladlo is operating without an operating permit from the Missouri Department of Natural Resources,

8) Gladlo has failed to provide water samples to the Missouri Department of Natural Resources for June, July and August, 2008.

9) Gladlo's owner has abandoned the system, and is unwilling and unable to operate the system.

IT IS ORDERED THAT:

1. Default is hereby entered against Gladlo Water & Sewer Company, Inc., and the averments of the complaint are deemed admitted.

² The rule also allows the Commission to set aside a default order if the respondent files a motion to set aside the order within seven days of the order's issue date if the Commission finds good cause for the respondent's failure to timely respond.

³ The list of findings is not exhaustive, but merely a summary of the more pertinent findings. Because Gladlo failed to answer the petition, all of Staff's allegations are deemed admitted.

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2. The General Counsel of the Commission is authorized and ordered to file a petition for the appointment of a receiver against Gladlo Water & Sewer Company in Phelps County, Missouri.

3. Upon receipt of names and contact information of potential interim receivers willing and able to operate Gladlo Water & Sewer Company, the Staff will provide the Commission this information.

4. This order shall become effective on September 25, 2008.

5. This case shall close on September 26, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Pridgin, Senior Regulatory Law Judge

In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc.

*Case No. EO-2008-0046
Decided: October 9, 2008*

Electric §1. The Commission rejected Aquila's application for authority to transfer operational control of certain assets because approving the application would prevent Aquila from choosing a better alternative, which would be detrimental to the public interest.

REPORT AND ORDER

APPEARANCES

Paul A. Boudreau, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102-0456, and **Renee Parsons**, Senior Attorney, Aquila, Inc., 20 West 9th Street, Kansas City, Missouri 64105.
For Aquila, Inc.

Mark W. Comley, Newman, Comley & Ruth, 601 Monroe St., Suite 301, Jefferson City, Missouri 65102.
For Midwest Independent Transmission System Operator, Inc.

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Larry W. Dority and James M. Fischer, Fischer & Dority, P.C. 101 Madison, Suite 400, Jefferson City, Missouri 65101, and
Curtis C. Blanc, Attorney at Law, Kansas City Power & Light Company, 1201 Walnut, Kansas City, Missouri 64141.
For Kansas City Power & Light Company.

Spencer Throssell, Smith Lewis, LLP, 111 South 9th Street, Suite 200, Columbia, Missouri 65201.
For Union Electric Company, d/b/a AmerenUE.

David C. Linton, David C. Linton, L.L.C., 424 Summer Top Lane, Fenton, Missouri 63026, and
Heather H. Starnes, Attorney at Law, 415 North McKinley, Suite 140, Little Rock, Arkansas 72205-3020.
For Southwest Power Pool, Inc.

Carl J. Lumley, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 S. Bemiston, Suite 200, St. Louis, Missouri 63105.
For Dogwood Energy, LLC.

Alan I. Robbins and Debra D. Roby, Jennings Strouss & Salmon, PLC, 1700 Pennsylvania Ave. NW, Suite 500, Washington, D.C. 20006, and
B. Allen Garner, City Counselor, and **Dayla Bishop Schwartz**, Assistant City Counselor, Law Department, City of Independence, 111 East Maple Street, Independence, Missouri 64050.

Nathan Williams, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102
For the Staff of the Missouri Public Service Commission.

Lewis R. Mills, Jr., Public Counsel, P. O. Box 2230, Jefferson City, Missouri 65102
For the Office of the Public Counsel and the Public.

**REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief
Regulatory Law Judge**

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Syllabus: This order denies Aquila, Inc.'s application for authority to transfer operational control of certain transmission assets to the Midwest Independent Transmission System Operator, Inc.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On August 20, 2007, Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P filed an application requesting authority to transfer operational control of certain transmission assets to the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). On August 28, the Commission directed that notice of the filing of Aquila's application be sent to all parties to Aquila's last rate case. That order also established an intervention deadline of September 17.

Dogwood Energy, LLC; Kansas City Power & Light Company; Southwest Power Pool, Inc.; Union Electric Company, d/b/a AmerenUE; and Midwest ISO filed timely applications to intervene. The Commission granted their requests to intervene on September 28. Subsequently, on October 30, the City of Independence, Missouri filed an application to intervene out of time. The Commission granted that application on November 13.

The Commission established a procedural schedule that required the parties to prefile direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on April 14 and 15, 2008. The parties filed post-hearing briefs on May 29.

Independent System Operators and Regional Transmission Organizations

1. Aquila's application seeks authority to become a full member of Midwest ISO. That corporation is both an Independent System Operator (ISO) and a Regional Transmission Organization (RTO). ISOs and RTOs are independent entities that have functional control over the operation of transmission facilities of multiple transmission owners under a common tariff. Midwest ISO, like other ISOs and RTOs, was established under the auspices of the Federal

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Energy Regulatory Commission (FERC).¹ Midwest ISO's operational area serves fifteen states and the Canadian province of Manitoba, and is located generally north and east of Missouri.²

2. Midwest ISO administers a common tariff, called an Open Access Transmission Tariff, that applies to all transmission services provided on the transmission facilities placed under the ISO's control by member electric companies. The common tariff applies the same rules to all transmission customers and avoids the "pancaking" of rates that occurs when power flows through transmission facilities operated by multiple entities and governed by multiple tariffs.³

3. An RTO provides wholesale transmission service on a regional basis. Such service meets two needs for transmission customers. First, it ensures the long-term deliverability of electricity from designated resources to load. In other words, the RTO provides a path by which electricity can be reliably transmitted from a generating facility to the customers that need that electricity. Second, the RTO facilitates short-term deliverability of electricity for economic transactions. That means, the RTO provides the transmission service required to deliver surplus electricity from lower-cost resources as a substitute for electricity from a higher-cost resource. That allows for the development of an electricity market in which those transactions can occur.⁴

4. Midwest ISO is not the only RTO capable of providing transmission services to Aquila. The FERC authorized Southwest Power Pool, Inc. to operate as a RTO beginning in October 2004.⁵ Southwest Power Pool also provides independent reliability coordination and tariff administration through a FERC approved Open Access Transmission Tariff.⁶ Southwest Power Pool has fifty members serving more than four million customers in all or parts of eight southwestern states.⁷

5. Aquila is already a member of Southwest Power Pool. Its predecessor companies, Missouri Public Service Company and St. Joseph Light and Power joined that organization in 1951 and 1958,

¹ Doying Rebuttal, Ex. 4, Page 4, Lines 12-18.

² Doying Rebuttal, Ex. 4, Page 4, Lines 7-8.

³ Doying Rebuttal, Ex. 4, Pages 4-5, Lines 19-24, 1.

⁴ Proctor Rebuttal, Ex. 12, Page 6, Lines 1-24.

⁵ Monroe Surrebuttal, Ex. 9, Page 4, Lines 11-13.

⁶ Monroe Surrebuttal, Ex. 9, Page 7, Lines 18-19.

⁷ Monroe Surrebuttal, Ex. 9, Page 7, Lines 13-14. A map showing the service areas of Southwest Power Pool and Midwest ISO can be found at Janssen Rebuttal, Ex. 15, Schedule RJ-3.

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respectively.⁸ Aquila currently contracts with Southwest Power Pool for certain services. Specifically, Aquila receives tariff administration, OASIS administration, available transmission capacity and total transmission capacity calculations, scheduling agent, and regional transmission planning from Southwest Power Pool.⁹ Aquila does not, however, participate in Southwest Power Pool's EIS market.¹⁰

6. Aquila now pays Southwest Power Pool between \$2 and \$3 million per year for its membership in that organization.¹¹ If the Commission approves Aquila's application and it joins Midwest ISO, Aquila will have to terminate its relationship with Southwest Power Pool.¹² In doing so, Aquila would incur approximately \$4 million in termination costs.¹³

7. Aquila also has a contractual relationship with Midwest ISO, currently receiving security coordination service from that organization.¹⁴ If instead of joining Midwest ISO, Aquila chose to fully participate in Southwest Power Pool, it would have to end its relationship with Midwest ISO.¹⁵

Aquila's Commitment to Apply for Membership in Midwest ISO

8. In 1999, Aquila, then known as UtiliCorp, agreed to merge with St. Joseph Light & Power Company. That proposed merger required the approval of both this Commission and FERC. In its order approving the merger, FERC required the merged company to file a plan to join an RTO. At the time, Midwest ISO was the only FERC-approved RTO in the area, so Aquila entered into an agreement to join Midwest ISO on July 16, 2001.¹⁶

9. In 2001, Aquila applied to both FERC and this Commission for approval to transfer operational control of its transmission system to Midwest ISO. FERC approved that transfer, but Aquila withdrew its application before this Commission on January 2, 2002.¹⁷ Aquila withdrew its application because AmerenUE, upon which

⁸ Monroe Surrebuttal, Ex. 9, Page 2, Lines 17-18.

⁹ Odell Direct, Ex. 1, Page 6, Lines 10-12. A brief description of these services can be found at Transcript, Pages 98-100.

¹⁰ Monroe Surrebuttal, Ex. 9, Page 5, Lines 14-15.

¹¹ Transcript, Page 101, Lines 11-21.

¹² Transcript, Page 110, Lines 23-25.

¹³ Transcript, Page 111, Lines 1-14.

¹⁴ Odell Direct, Ex. 1, Page 6, Lines 8-10.

¹⁵ Transcript, Page 111, Lines 18-24.

¹⁶ Odell Direct, Ex. 1, Page 3, Lines 3-9.

¹⁷ Odell Direct, Ex. 1, Pages 3-4, Lines 11-20, 1-4.

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Aquila is dependent for its physical connection to the Midwest ISO control area, had withdrawn from Midwest ISO, leaving Aquila with no physical connection to the RTO.¹⁸

10. In anticipation of turning operational control of its transmission system over to Midwest ISO, Aquila transferred security coordination responsibilities from Southwest Power Pool to Midwest ISO. As previously indicated, Midwest ISO continues to provide that service to Aquila on a contractual basis.¹⁹

11. On December 20, 2002, Aquila made a filing with FERC challenging the reasonableness of certain administrative costs that Midwest ISO proposed to assess against Aquila.²⁰ Aquila and Midwest ISO settled that dispute, and one of the provisions of the settlement agreement required Aquila to once again apply to transfer operational control of its transmission facilities to Midwest ISO and diligently pursue approval of that application.

12. Aquila complied with that requirement of the settlement agreement by filing a second application with this Commission on June 20, 2003, again seeking authority to transfer control of its transmission facilities to Midwest ISO. After a number of delays, the Commission dismissed that application, without prejudice, to be refiled when additional system cost information became available.²¹ On August 20, 2007, Aquila refiled its application, causing this case to open.

13. In its testimony, Aquila confirmed that it filed the application currently before the Commission to satisfy its obligation under the 2003 FERC settlement with Midwest ISO.²² At the hearing, Aquila's witness, Dennis Odell, indicated Aquila's concern that it would be required to pay financial penalties to Midwest ISO if it breached its contractual obligation to again apply for membership in Midwest ISO.²³ When asked at the hearing whether Aquila would have applied for membership in Midwest ISO in the absence of its obligation under the 2003 settlement, Odell replied that he did not know.²⁴

¹⁸ Odell Direct, Ex. 1, Page 4, Lines 5-9.

¹⁹ Odell Direct, Ex. 1, Page 4, Lines 12-15.

²⁰ Odell Direct, Ex. 1, Page 4, Lines 15-17.

²¹ Odell Direct, Ex. 1, Page 5, Lines 1-7. See also, *In the Matter of Aquila, Inc. d/b/a Aquila Networks – MPS and Aquila Networks – L&P's Application to Join the Midwest Independent Transmission System Operator, Inc.*, Order Closing Case, Case No. EO-2003-0566, May 12, 2005.

²² Odell Direct, Ex. 1, Page 6, Lines 17-20.

²³ Transcript, Page 95, Lines 5-16.

²⁴ Transcript, Pages 114-115, Lines 18-25, 1-2.

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The CRA International Study

14. As part of its application, Aquila submitted the results of a cost-benefit analysis performed by CRA International. CRA is an independent consulting firm hired by Aquila to analyze the costs and benefits of Aquila's various options for joining, or not joining, an RTO.²⁵ After consulting with a stakeholder group that included Midwest ISO, Southwest Power Pool, Staff, and Public Counsel,²⁶ Aquila instructed CRA to consider three scenarios: membership in Midwest ISO; membership in Southwest Power Pool; and a move to a stand-alone status in which Aquila would perform transmission and reliability related functions on its own.²⁷ CRA completed the study on March 28, 2007, and Aquila submitted a copy of the study as part of its application, and as an attachment to Dennis Odell's direct testimony.²⁸

15. To conduct its study, CRA ran a detailed economic dispatch and production cost model that simulates the operation of the electric power system. The model, known as GE MAPS, determines the security-constrained commitment and hourly dispatch of each modeled generating unit, the loading of each element in the transmission system, and the locational marginal price (LMP) for each generator and load area.²⁹ Membership in an RTO reduces impediments to Aquila's purchases and sales of energy and capacity to other RTO members, yielding "trade benefits" to Aquila. Those "trade benefits" are offset by additional administrative charges Aquila would incur by being a member of an RTO.³⁰

16. The study concluded that over the ten-year study period, the net benefit to Aquila of joining Midwest ISO was \$21.1 million, compared to moving to a stand-alone status. However, the study also concluded that the net benefit to Aquila of joining Southwest Power Pool's RTO over the same period amounted to \$86.9 million, again compared to a stand-alone status.³¹

17. Given the greater net benefits shown by the study to result from Aquila's membership in the Southwest Power Pool RTO, several parties, including Southwest Power Pool, urge the Commission

²⁵ Odell Direct, Ex. 1, Page 7, Lines 1-3.

²⁶ Transcript, Page 121, Lines 7-21.

²⁷ Odell Direct, Ex. 1, Page 7, Lines 3-5.

²⁸ Odell Direct, Ex. 1, Schedule DO-3.

²⁹ Odell Direct, Ex. 1, Schedule DO-3, Page 2.

³⁰ Odell Direct, Ex. 1, Schedule DO-3, Page 2.

³¹ Odell Direct, Ex. 1, Schedule DO-3, Page 4, Table 1.

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to reject Aquila's application to join Midwest ISO so that the company can instead apply to join Southwest Power Pool's RTO. Aquila, using an argument the Commission will address in detail in the conclusions of law section of this Report and Order, contends the Commission should not consider the Southwest Power Pool alternative in ruling on its application to join Midwest ISO. In addition, Midwest ISO and the City of Independence challenge the factual basis of the CRA study's conclusion that the net financial benefits Aquila would attain from joining Southwest Power Pool's RTO would significantly exceed the net benefits of joining Midwest ISO.

18. A large part of the challenge to the accuracy of the CRA study's analysis of the Aquila in Southwest Power Pool alternative is centered on the study's assumption that Southwest Power Pool and Midwest ISO will operate similar markets over the long-term time frame used in the study.³² In fact, Midwest ISO currently operates both a real-time market and a day-ahead market, while Southwest Power Pool operates only a real-time market.³³ Southwest Power Pool is currently evaluating whether a day-ahead market would be cost effective and the earliest it could implement such a market would be between the end of 2010 and 2012.³⁴ The existence of additional markets can result in increased trade benefits for Aquila.³⁵ As a result, the study's assumption of similar markets could overstate the benefits to Aquila of membership in Southwest Power Pool, at least in the short-run.

19. That is not, however, a serious flaw in the study. When evaluating a company's request to join an RTO it is appropriate to consider the long-run costs and benefits of that membership, not short-term variations. In the long run, it is appropriate to assume Southwest Power Pool will implement these additional markets if doing so proves cost beneficial.³⁶ To account for the short-term variation, the CRA study assumed not only that Midwest ISO and Southwest Power Pool offered similar markets; it also assumed that the two companies charged their members identical administrative charges to operate those markets. While additional markets tend to increase trade benefits, the additional

³² Odell Direct, Ex. 1, Schedule DO-3, Page 8.

³³ Transcript, Page 151, Lines 11-14.

³⁴ Monroe Surrebuttal, Ex. 9, Page 17, Lines 14-21.

³⁵ Transcript, Page 288, Lines 12-14.

³⁶ Proctor Rebuttal, Ex. 12, Page 25, Lines 15-16.

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markets also increase administrative charges, resulting in a rough balance at least in the short-term.³⁷

20. Midwest ISO engaged the services of an economic consultant, Johannes P. Pfeifenger³⁸, to further evaluate the CRA study. Pfeifenger concluded the CRA study tends to overstate the benefits Aquila would achieve from joining Southwest Power Pool instead of Midwest ISO. In large part, Pfeifenger's criticism of the results of the CRA study is centered on the model's dispatch of the Dogwood combined-cycle merchant generating plant, which is located in Aquila's service territory.³⁹

21. Pfeifenger contends the CRA study greatly over-commits the Dogwood plant in the "Aquila Stand Alone" and the "Aquila in Midwest ISO" simulation scenarios, but not in the "Aquila in Southwest Power Pool" scenario. This over-commitment of the Dogwood plant is uneconomic, indicating greater costs for Aquila in those scenarios. According to Pfeifenger, the presence of these greater costs unrealistically indicates greater benefits to Aquila from joining Southwest Power Pool since those uneconomic costs are not included in the "Aquila in Southwest Power Pool" scenario.⁴⁰

22. However, as Staff's witness, Dr. Michael Proctor explains, the heavy commitment of the Dogwood plant in the Aquila in Midwest ISO scenario reflects a real problem, not a problem with the modeling. Because of limited transmission between Midwest ISO and the resulting high levels of congestion, energy imports from the Midwest ISO generation pool were not available for unit commitment and consequently, the Dogwood plant had to be committed more to meet Aquila's load.⁴¹ Thus, the model is demonstrating a real drawback to Aquila's proposed membership in Midwest ISO. It simply does not have adequate transmission links with the rest of Midwest ISO.

Aquila's Limited Interconnection with Midwest ISO

23. Aquila is linked to Midwest ISO by just two tie line connections with AmerenUE, which is a member of Midwest ISO. Those

³⁷ Transcript, Page 110, Lines 13-22.

³⁸ Pfeifenger is a Principal and Director of The Brattle Group, an economic consulting firm. He has an M.A. in Economics and Finance from Brandeis University and an M.S. in Electrical Engineering with a specialization in Power Engineering and Energy Economics from the University of Technology, Vienna, Austria. Pfeifenger Rebuttal, Ex. 5, Page 1.

³⁹ The Dogwood Plant was formerly known as the Aries Plant and is sometimes referred to as such in the testimony.

⁴⁰ Pfeifenger Rebuttal, Ex. 5, Pages 8-9, Lines 20-23, 1-7.

⁴¹ Proctor Cross Surrebuttal, Ex. 13, Page 12, Lines 12-15.

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two tie lines have a summed MVA capacity⁴² of 1,207. In contrast, Aquila is linked to Southwest Power Pool by 14 tie lines with a summed MVA capacity of 5,915.⁴³ Thus, the megawatt import capability from Southwest Power Pool into Aquila is much higher than from Midwest ISO into Aquila.⁴⁴ This greater interconnection with Southwest Power Pool allows Aquila to displace expensive generation in its own control area with less expensive purchased power from the Southwest Power Pool control area, resulting in cost savings for Aquila.⁴⁵

AmerenUE's Decision to Remain in Midwest ISO

24. As indicated, Aquila's two tie lines connecting it to Midwest ISO connect through AmerenUE. During the course of this case, AmerenUE was considering whether it would choose to remain a member of Midwest ISO. If AmerenUE withdrew from Midwest ISO, Aquila would no longer have any direct transmission connection to Midwest ISO and it would be difficult for it to continue to participate in Midwest ISO.⁴⁶ However, while this case was awaiting decision, the Commission approved a stipulation and agreement that will allow AmerenUE to remain in Midwest ISO at least through 2011.⁴⁷

The Merger with KCPL

25. One other development that occurred during the course of this case will have a definite impact on the possible benefits to Aquila from joining Midwest ISO. On July 1, 2008, in Case No. EM-2007-0374, the Commission approved the acquisition of Aquila by Great Plains Energy Incorporated, the parent company of Kansas City Power & Light Company (KCPL).⁴⁸ KCPL is currently a member of Southwest Power Pool.⁴⁹ In approving the merger, the Commission recognized that the merged entity controlling both KCPL and Aquila would realize significant

⁴² MVA stands for mega volt amperes, a measure of the transmission capacity of a power line. Janssen Rebuttal, Ex. 15, Page 12, Footnote 8.

⁴³ Proctor Rebuttal, Ex. 12, Page 29, Table 1.

⁴⁴ Proctor Rebuttal, Ex. 12, Page 30, Lines 19-21.

⁴⁵ Odell Direct, Ex. 1, Schedule DO-3, Page 5.

⁴⁶ Transcript, Page 107, Pages 11-25.

⁴⁷ *In the Matter of the Application of Union Electric Company for Authority to Continue the Transfer of Functional Control of its Transmission System to the Midwest Independent Transmission System Operator, Inc.*, Case No. EO-2008-0134, Order Approving Stipulation and Agreement, issued September 9, 2008.

⁴⁸ *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief.*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

⁴⁹ Transcript, Page 106, Lines 16-17.

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synergy benefits from operating both companies in the same RTO.⁵⁰ Those merger synergies could be lost if Aquila joined Midwest ISO while KCPL remained a member of Southwest Power Pool.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Aquila, Inc., is an “Electrical Corporation” and “Public Utility”, as those terms are defined at Subsections 386.020 (15) and (42), RSMo Supp. 2007. As such, it is subject to regulation by this Commission.

2. Section 393.190.1, RSMo 2000 requires a regulated electric utility, such as Aquila, to obtain permission from the Commission before transferring control of any part of its transmission system. Specifically, the relevant portion of that section states:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

3. The statute does not establish a specific standard for the Commission to use in deciding whether to authorize an electric utility to transfer control of its transmission system. However, that controlling standard was established by the Missouri Supreme Court in a 1934 decision.

4. In its decision in *State ex rel. City of St. Louis v. Public Service Commission*,⁵¹ the Missouri Supreme Court held that in deciding to approve a proposed transfer of stock in a Missouri utility, the Commission did not need to find that the proposed transaction would benefit the public interest. Instead, the court quoted the Supreme Court of Maryland in holding:

⁵⁰ *Id.* at Pages 196-197.

⁵¹ 73 S.W.2d 393 (Mo banc 1934)

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To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. *'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public'* (emphasis added).⁵²

Thus, before it can approve Aquila's proposal to transfer control of its transmission system to Midwest ISO, the Commission must determine that the proposed transfer would not be detrimental to the public interest.

5. The Commission has also incorporated the "not detrimental to the public" standard into its own rules. Commission Rule 4 CSR 240-3.110(1)(D) requires an electric utility seeking authority to sell, assign, lease or transfer assets to state "the reasons the proposed sale of the assets is not detrimental to the public interest."

6. Clearly, "not detrimental to the public interest" is the standard by which this Commission must weigh Aquila proposal to transfer control of its transmission system to Midwest ISO.

7. In deciding whether a proposed transaction is "not detrimental to the public interest", the Commission must consider and decide all the necessary and essential issues.⁵³

8. One necessary and essential issue the Commission must consider is the lost opportunity cost associated with allowing Aquila to join Midwest ISO instead of Southwest Power Pool.

9. When alternatives with economic impacts are presented, an evaluation of the detriments of a particular alternative to the public interest must include consideration of the opportunity cost of not pursuing any available alternatives. There do not appear to be any Missouri state court cases directly announcing this principle, but it is a well-established aspect of Federal administrative law.⁵⁴

10. Missouri's Western District Court of Appeals has recently held that the Commission is not limited to narrowly considering the

⁵² Id. at 459-460. (Quoting, *Electric Public Utilities Co. v. Public Service Commission*, 154 Md 445, 140 A. 840, 844, (Md. 1928).

⁵³ *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003).

⁵⁴ For example see, *Victor Broadcasting v. FCC*, 722 F.2d 756 (DC Cir. 1983).

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possible benefits of a presented alternative when other alternatives are also important. In *Environmental Utilities, LLC v. Public Service Commission*,⁵⁵ the court upheld the Commission's rejection of a proposed sale of a part of the sewer system of a troubled utility, because, while there were benefits to those customers who would be served by the purchaser, the benefits of the sale of the entire system would be greater, and would be lost if the incomplete transaction were allowed to proceed.

11. Obviously, if Aquila transfers its transmission system to Midwest ISO and joins that RTO, it cannot join Southwest Power Pool's RTO. Foregoing greater financial benefits that could be obtained from joining Southwest Power Pool to instead accept lesser financial benefits from joining Midwest ISO is a potential detriment to the public that the Commission must consider.

DECISION

Based on the facts as it has found them, and its conclusions of law, the Commission has reached the following decision.

Aquila's proposal to transfer operational control of its transmission assets to Midwest ISO would cause a detriment to the public interest and on that basis, Aquila's application will be denied.

The detriment to the public interest occurs, in part, because Aquila's plan to join Midwest ISO would preclude it from joining Southwest Power Pool. As established by the independent and credible cost benefit analysis performed by CRA International, the net benefit to Aquila of joining Midwest ISO would be approximately \$65 million less over ten years than the net benefit it could obtain by joining Southwest Power Pool.

Midwest ISO and the City of Independence challenged the conclusions of that study, but their arguments are not persuasive. Midwest ISO currently offers a more fully developed day-ahead energy market to its member utilities than does Southwest Power Pool. However, Aquila's decision to join an RTO is a long-term decision, so it is appropriate to place greater emphasis on the long-term results of that decision. Over the long-term, Southwest Power Pool's markets are likely to catch-up with those offered by Midwest ISO, and the CRA International study appropriately accounts for those differences in the short-term.

⁵⁵ 219 S.W.3d 256 (Mo. App. W.D. 2007).

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Midwest ISO's other criticism of the CRA International Study focuses on the model's allegedly unrealistic dispatch of the Dogwood plant in the "Aquila in Midwest ISO" scenario. However, rather than highlighting a problem with the study's model, this criticism points out a real life problem with Aquila's proposal to join Midwest ISO. Aquila's existing transmission connections to the rest of Midwest ISO, through its interconnections with AmerenUE, simply are not as extensive as its connections to Southwest Power Pool. The additional transmission congestion over those limited connections that would result if Aquila joined Midwest ISO is an additional detriment to the public.

Finally, the public, specifically, Aquila's ratepayers, will suffer one more detriment if Aquila is allowed to join Midwest ISO, thereby excluding it from membership in Southwest Power Pool. Many of the financial benefits ratepayers are likely to see from the recent acquisition of Aquila by the parent corporation of KCPL are predicated on Aquila and KCPL being members of the same RTO. KCPL is already a member of Southwest Power Pool so if Aquila is allowed to join Midwest ISO, many of those financial benefits will be lost.

Nevertheless, Aquila has asked for permission to join Midwest ISO. Under other circumstances, the Commission might be inclined to defer to the business judgment of Aquila if there were a good reason to do so. However, it is clear that the only reason Aquila has applied to join Midwest ISO instead of Southwest Power Pool is its obligation to do so under a six-year-old agreement with Midwest ISO in a case before FERC. This Commission is not bound by that agreement, and its existence is not a sufficient reason to defer to Aquila's judgment. The Commission will not allow the existence of that agreement to harm Aquila's Missouri ratepayers by allowing Aquila to enter into a less than optimal agreement with Midwest ISO.

The CRA International cost-benefit study shows that Aquila, and thereby its ratepayers, will benefit if Aquila joins an RTO. However, Midwest ISO is not the appropriate RTO for Aquila to join. The question of whether Aquila should join Southwest Power Pool is not properly before the Commission in this case, so the Commission will not now order Aquila to apply to join that RTO. However, Aquila has now satisfied its contractual obligation by applying for authority to transfer operational control of its transmission facilities to Midwest ISO and diligently pursuing approval of that application. The Commission has rejected that application on its merits. Aquila is now free to apply to the Commission for authority to join whichever RTO best meets its needs.

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IT IS ORDERED THAT:

1. Aquila, Inc.'s Application for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc. is rejected.

2. This Report and Order shall become effective on October 19, 2008.

Murray, Clayton, Jarrett, Gunn, CC., concur;
Davis, Chm., concurs with separate concurring opinion attached;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 9th day of October, 2008.

Complaint of Charter Fiberlink-Missouri, LLC, Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC

Case No. LC-2008-0049
Decided: October 21, 2008

Telecommunications §1. The Commission found that charges associated with the porting of telephone numbers were unauthorized under the interconnection agreement between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC. In coming to this conclusion the Commission looked to the wording of the agreement, and then to past behavior of the companies.

REPORT AND ORDER

APPEARANCES

Mark. W. Comley, Newman, Comley & Ruth, 601 Monroe Street, Suite 301, P.O. Box 537, Jefferson City, Missouri 65102. Attorney for Charter Fiberlink-Missouri, LLC.

K. C. Halm, Davis, Wright, Tremaine, LLP, 1919 Pennsylvania Avenue, NW, Suite 200, Washington, D.C. 20006. Attorney for Charter Fiberlink-Missouri, LLC.

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Larry W. Dority, Fischer & Dority, PC, 101 Madison, Suite 400, Jefferson City, Missouri 65101. Attorney for CenturyTel of Missouri, LLC.

Tyler Peters, Payne & Jones, Chartered, 11000 King, Overland Park, Kansas 66210. Attorney for CenturyTel of Missouri, LLC.

Marc Poston, Senior Public Counsel, Office of the Public Counsel, 200 Madison Street, Post Office Box 2230, Jefferson City, Missouri 65102. Attorney for the Office of the Public Counsel and the public.

Blane Baker, Assistant General Counsel, Missouri Public Service Commission, 200 Madison Street, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Missouri Public Service Commission.

JUDGE: Kennard L. Jones

Background

In 2001 GTE Midwest Incorporated, d/b/a Verizon Midwest and Charter Fiberlink – Missouri, LLC entered into an Interconnection Agreement. In 2002 CenturyTel of Missouri, LLC acquired Verizon's assets including the agreement, unchanged, as entered into between Verizon and Charter.

As required by federal law¹, the Agreement contains provisions to facilitate number portability.² Number portability is the term used to describe a telephone customer's ability to keep the same telephone number when changing telephone companies.³ Under the Agreement, each time a customer wishes to maintain a telephone number when switching companies, the parties are required to work together to port the customer's telephone number(s).⁴ CenturyTel maintains that this is a "service" for which it can bill Charter. Charter disputes the charges and, like the Staff of the Commission, argues that under the Agreement neither party is allowed to charge for porting telephone numbers. As a result of Charter not paying the charges associated with porting

¹ 47 U.S.C. §251 (b)(2).

² Exhibit 1, p. 78, section 15.

³ Schremp Direct, p. 3, lines 13-16.

⁴ Exhibit 1, p. 78 section 15.2.1.

telephone numbers to it from CenturyTel, CenturyTel threatened to stop processing orders to port. Charter then filed this complaint, asking the Commission for relief largely relevant to number porting.

CenturyTel initially argued that Charter's complaint should be dismissed because Charter did not comply with the dispute resolution provision in the Agreement. Because CenturyTel recognizes, however, that this matter needs to be resolved, it no longer asserts Charter's noncompliance.⁵

Relief requested

In its complaint, Charter asks the Commission to issue an order:

- 1) directing CenturyTel to continue processing service order requests from Charter;
- 2) stating that charges associated with the porting of telephone numbers are not authorized by the parties' Agreement;
- 3) stating that charges associated with number portability are not authorized by federal law;
- 4) requiring CenturyTel to refund \$68,867.61 paid by Charter for porting requests; and
- 5) stating that CenturyTel is not entitled to payment, and that Charter is not liable for, other charges including customer records searches, unique directory listings and other miscellaneous charges.

Although directed to do so, the parties were unable to agree on and file a list of issues. The Commission will therefore resolve this matter by addressing the specific relief requested by Charter. Each request for relief will serve as an issue. Upon review of the record the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. CenturyTel is a Missouri incumbent local exchange company.⁶
2. Charter is a certificated local exchange carrier operating under a certificate issued by the Missouri Public Service Commission.⁷
3. Charter is a facilities-based competitor with its own network and switching equipment⁸ and does not purchase

⁵ Miller Direct, p. 30, line 19 to p. 31, line 2.

⁶ Miller Direct, p. 2, lines 9-10.

⁷ Commission Case No. TA-2001-346.

⁸ Schremp Rebuttal, p. 10, lines 14-15.

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telecommunications services from CenturyTel.⁹

4. The Interconnection Agreement under which Charter and CenturyTel operate is an agreement negotiated originally between Charter and Verizon,¹⁰ to which CenturyTel is a successor in interest.¹¹

5. Verizon and Charter did not charge one another for porting telephone numbers while operating under the Agreement.¹²

6. Charter does not charge CenturyTel for porting numbers from CenturyTel to Charter.¹³

7. Initially, CenturyTel did not charge Charter to port telephone numbers.¹⁴

8. The Interconnection Agreement between Charter and CenturyTel is defined in the Agreement to include “(a) the principal document; (b) the Tariff of each party applicable to the Services that are offered for sale by it in the principal document (which tariffs are incorporated into and made a part of this Agreement by reference); and (c) an Order by a party that has been accepted by the other party.”¹⁵

9. Section 15 of the Agreement describes the parties’ obligations with regard to porting telephone numbers.¹⁶

10. CenturyTel did not begin to charge Charter for porting telephone numbers until 9 months after it succeeded Verizon under the Interconnection Agreement.¹⁷

11. CenturyTel began charging Charter for porting requests in 2003 when a CenturyTel employee, unfamiliar with interconnection,¹⁸ saw the word “port” in the Pricing Attachment to the Agreement and began assessing a charge of \$19.78 per number ported.¹⁹

12. The “porting” charge upon which the CenturyTel employee relied refers to an unbundled network element for basic exchange.²⁰

13. The Pricing Attachment, which is a part of the

⁹ Schremp Rebuttal, p. 11, lines 9-12.

¹⁰ Schremp Direct, p. 24, lines 17-20 and Tr. 68, line 17 – p. 69, line 2.

¹¹ Schremp Direct, p. 20, lines 26-28.

¹² *Id.*

¹³ Schremp Direct, p. 7, lines 10-13.

¹⁴ Tr. 73, lines 10-11.

¹⁵ Exhibit 1, General Terms and Conditions, Section 1.1 of the Interconnection Agreement.

¹⁶ Tr. 72, line 23 – p. 73, line 3.

¹⁷ Tr. 73, lines 12-14.

¹⁸ Tr. 73, lines 15-17 and Tr. 164, lines 10-15.

¹⁹ *Id.*

²⁰ Interconnection Agreement, Pricing Attachment, page 136.

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Interconnection Agreement, does not contain a charge for porting requests.

14. CenturyTel was aware, in 2004, that the charge of \$19.78 was not supported by the Agreement.²¹

15. After assessing the charge of \$19.78 per number ported for three and a half years, CenturyTel, relying on its tariff, began charging Charter \$23.44 or \$23.48, depending on whether the exchange is competitive or non-competitive.²²

16. Under CenturyTel's General and Local Exchange Tariff ("CenturyTel's Tariff"), service charges apply when the following activities are performed:

- a. Service Connection — New installations or subsequent addition of telephone service and/or semi-public telephone equipment. A move of an existing service to a different premise.
- b. Inside Moves — Transfer of telephone service and/or semi-public equipment from one location to another location within the same building or that portion of the same building occupied by the same customer, where there is no interruption of the service other than is incidental to the work involved.
- c. Changes — Substitution of semi-public telephone equipment, or rearrangement of such equipment and/or wiring which does not involve changes in location of the equipment or wiring. Also includes directory listing changes and other modifications or rearrangements that do not involve equipment or wiring.
- d. Restoral Charge - Applicable for work associated with reconnecting service which has been temporarily disconnected for nonpayment.²³

17. Porting requests do not fit under any of the activities set out under the definitions of Service Charges.

18. CenturyTel's Tariff contains no provision for porting.

19. CenturyTel's Tariff applies to end-user customers, and

²¹ Tr. 164, line 16 – p. 165, line 11.

²² Tr. 73, lines 18-22 and Voight Rebuttal, p. 6, lines 1-4.

²³ CenturyTel of Missouri, LLC's tariff, PSC Mo. No. 1, Original Sheet 1.

does not apply to facilities-based competitors, such as Charter.

20. Under the Agreement, a Local Service Request (LSR) is defined as “an industry form, which contains data elements and usage rules, used by the Parties to establish, add, change or disconnect resold Telecommunications Services and Network Elements.”²⁴

21. A porting request is not a request to “add, change or disconnect resold Telecommunications Services [or] Network Elements.”

22. Charter and CenturyTel do not use LSRs for porting requests to add, change or disconnect resold Telecommunications Services or Network Elements.

23. The charge for a “Non-engineered Initial Service Order – Changeover” is \$21.62.²⁵

24. A Non-engineered Initial Service Order is a resold service.²⁶

25. The Interconnection Agreement does not provide for charges for porting numbers.²⁷

26. On June 16, 2004, Charter paid under protest, \$68,867.61 to CenturyTel for CenturyTel’s role in porting customer telephone numbers from CenturyTel to Charter.²⁸

27. Charter disputed paid charges and prospective charges for number porting as early as June of 2003.²⁹

28. In addition to giving specific notice to CenturyTel that it disputed paying charges for number porting, Charter also prospectively disputed the class of charges.³⁰

29. With regard to disputed amounts, the Interconnection Agreement provides the following:

If any portion of an amount billed by a Party under the Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes and include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges that it disputes. Notice

²⁴ Exhibit 1, Interconnection Agreement, Glossary Definitions, 2.54, at page 37.

²⁵ CenturyTel post hearing brief, p. 21-22; Exhibit 1, Interconnection Agreement, Pricing Attachment, p. 126.

²⁶ Exhibit 1, Interconnection Agreement, Pricing Attachment, p. 126

²⁷ Tr. 72, lines 17-19

²⁸ Schremp Direct, p. 15 lines 12-15 and Miller Direct, p. 31, lines 21-22.

²⁹ Exhibits 15 and 16.

³⁰ Letter dated July 26, 2004, filed as an attachment to Schremp Direct.

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of a dispute may be given by a Party at any time, either before or after an amount is paid, and a Party's payment of an amount shall not constitute a waiver of such Party's right to subsequently dispute its obligation to pay such amount or to seek a refund of any amount paid. The billed Party shall pay by the Due Date all undisputed amounts. Billing disputes shall be subject to the terms of Section 14, Dispute Resolution.³¹

30. Charter has complied with the requirements of the Agreement concerning disputed amounts.

31. Section 4, beginning on page 45 of the Agreement, sets out the parties' respective responsibilities with regard to directory listings.³²

32. Charter has the responsibility to provide to CenturyTel on a regularly scheduled basis, all listing information regarding Charter's customers.³³

33. Both Charter and CenturyTel must use commercially reasonable efforts to ensure the accurate publication of Charter customer listings.³⁴

34. At Charter's request, CenturyTel is obligated to provide to Charter, between 30-90 days prior to the close date of the applicable directory, a report of all Charter customers.³⁵

35. Charter has been credited for charges relating to the miscellaneous charges and the monthly recurring charges for unique directory listings.³⁶

36. The Interconnection Agreement provides for a charge of \$4.21 for Customer Records Searches.³⁷

CONCLUSIONS OF LAW

Commission's Jurisdiction

The Commission has granted certificates of service authority to both Charter and CenturyTel to provide telecommunications service within the State of Missouri. Under Missouri law they are subject to the Commission's jurisdiction.³⁸ Although the Interconnection Agreement

³¹ Exhibit 1, Interconnection Agreement, p. 10, Section 9.3.

³² Exhibit 1, Interconnection Agreement, p. 45, Section 4.

³³ *Id.*, Section 4.2.

³⁴ *Id.*, p. 46, Section 4.6.

³⁵ *Id.*

³⁶ Hankins Direct, p. 2, lines 9-12.

³⁷ Exhibit 1, the Interconnection Agreement, Pricing Attachment, p. 138.

³⁸ Section 392.250 (2). RSMo 2000

under which the parties operate is facilitated by federal law,³⁹ state commissions have jurisdiction to interpret and enforce interconnection agreements.⁴⁰

Issue 1

Whether CenturyTel must continue processing service order requests from Charter?

Charter's first request, that the Commission direct CenturyTel to continue processing service orders during the course of this complaint, was granted by the Commission through an order issued in this case on August 27, 2007.⁴¹

Issue 2

Whether the Interconnection Agreement between Charter and CenturyTel allows the parties to charge one another for porting customer telephone numbers?

It is clear that the framers of the Interconnection Agreement, Verizon and Charter, did not intend that there be a charge for porting telephone numbers because while operating under the agreement the two did not charge one another. Charter still does not charge for porting requests. In light of the fact that CenturyTel did not charge for porting during the first nine months after it and Charter operated under the Agreement, CenturyTel's position on this issue is suspect. The record shows that it was only by chance that CenturyTel began charging for porting request because an employee with CenturyTel, unfamiliar with interconnection agreements, saw the word "port" in the Pricing Attachment and thought it was a charge for porting requests. In 2003, that employee assessed a charge of \$19.78. The "port" does not concern porting requests but actually refers to the unbundled network element for basic exchange. Although CenturyTel knew that the \$19.78 charge was incorrect, it continued to charge this amount for three years. Then, in 2007, CenturyTel began charging a "Service Ordering Charge" of \$23.48 or \$23.44.

The fee of \$23.48 is listed in the tariff under "Service Order Charge" as an "initial" charge. There is also a Service Order Charge of \$8.44 described as a "subsequent" charge. There is no such thing as an "initial" port request and a "subsequent" port request. Also, notably, there is only a charge of \$23.48 listed in the tariff. There is no listed

³⁹ 47 U.S.C. §251

⁴⁰ *Southwestern Bell Tel. Co. v. Connect Commun. Corp.*, 225 F3d 942, 947 (8th Cir. 2000).

⁴¹ Order Directing CenturyTel to Continue to Process Charter Service Order Requests While This Complaint is Pending

charge of \$23.44 in the tariff. CenturyTel's attempt to link a charge to its tariff is through the fact that porting requests are made by using a Local Service Request or LSR.

To elaborate, an LSR is defined as a form used by the parties in relation to resold services and network elements. It is not contested that Charter does not resell CenturyTel's services. Nor does CenturyTel argue that a porting request constitutes a network element. Therefore, the use of an LSR for porting requests is not consistent with the definition of an LSR. It appears that the LSR is used for porting requests for purposes of convenience rather than as a vehicle through which a charge should be assessed.

CenturyTel for the first time, in its posthearing brief, theorizes that the charge could be \$21.62; a figure set out in the Pricing Attachment as "Non-engineered Initial Service Order – Changeover." This charge is listed under non-recurring charges for resale services but Charter does not purchase resold services from CenturyTel. Therefore, this charge could not apply to Charter. The Commission concludes that neither the Agreement, nor the documents to which the Agreement refers, provide for a charge for porting requests.

Issue 3

Whether federal law prohibits charges for porting telephone numbers?

Federal law creates a duty that local exchange carriers provide, to the extent technically feasible, number portability in accordance with requirement prescribed by the Federal Communications Commission (FCC).⁴² With regard to carriers recovering their costs related directly to long-term number portability, the FCC neither requires nor prohibits a charge for porting requests.⁴³ This FCC rule specifically refers to an incumbent local exchange carrier's ability to charge end-users for costs associated with providing long-term number portability. The Commission has found that Charter is not an end-user. The rule is silent on whether CenturyTel may charge Charter for long-term number portability costs.

Therefore, the Commission concludes that federal law neither prohibits nor mandates that there be a charge for porting requests.

Issue 4

Whether the Commission should order CenturyTel to refund the \$68,867.61 paid by Charter for porting requests?

⁴² 47 U.S.C. §251(b)(2) and (e)(2).

⁴³ See 47 C.F.R. 52.33.

The Interconnection Agreement provides that notice of disputed amounts may be given before or after the amount in dispute is paid. As the Commission has found, Charter has disputed the \$68,867.61 it paid to CenturyTel for porting requests both before and after payment. The Agreement also provides that payment of an amount in dispute does not constitute a waiver or the right to seek a refund. Thus, CenturyTel's argument that Charter has waived any refund because Charter has paid the disputed amount is contrary to the language in the Agreement.

The Commission has found that Charter has complied with the dispute resolution process in the Agreement. The Commission has also concluded that the Agreement does not provide for a charge for porting requests. Therefore, the Commission concludes that CenturyTel shall refund to Charter \$68,867.61.

Issue 5

Whether Charter has been improperly billed for customer records searches, monthly recurring charges and other miscellaneous billing charges that do not fall into the former two categories?

Customer Records Searches

Charter opines that the purpose of a customer records search is to ensure that Charter's subscriber information is accurately listed in the public directories.⁴⁴ Charter disputes any charges for customer records searches because CenturyTel did not fulfill its obligations under the Agreement to properly list Charter's subscribers in the CenturyTel directory.⁴⁵ CenturyTel, on the other hand, points out that customer record searches have nothing to do with ensuring that Charter's subscriber information is properly listed in CenturyTel's directories.⁴⁶ CenturyTel also points out that carriers request customer records information just prior to a sending a port request. At the time this occurs, the customer is CenturyTel's customer. CenturyTel then argues that information could not be used for the purpose as described by Charter.⁴⁷

Under the Agreement there is a charge of \$4.21 for customer records searches. Charter's reason for contesting these charges is that CenturyTel did not properly list Charter's subscriber directory information correctly. Regardless of Charter's reason for requesting customer record searches, the Agreement contains provisions for assuring accuracy of Charter's subscriber information. Customer record searches are not

⁴⁴ Schremp Direct, p 10, lines 11-13.

⁴⁵ *Id.*, lines 20-22.

⁴⁶ Miller Rebuttal, p. 14, lines 10-11.

⁴⁷ Hankins Rebuttal, p. 4, line 16 to p. 5, line 3.

relevant to this provision. Charter's reason for not paying this charge, that CenturyTel has not performed the work, therefore fails. Charter has the burden of proving issues under this complaint.⁴⁸ The Commission concludes that Charter has not shown that CenturyTel is at fault for improper charges for customer record searches.

Monthly Recurring Charges

Charter also asserts that CenturyTel has assessed monthly recurring charges associated with certain directory listings such as non-publish or non-list status in CenturyTel directories but has not performed the work. This issue is directly related to the discussion above in that it concerns directory listings.⁴⁹

Charter makes a general statement regarding CenturyTel's failure in this regard but does not show how CenturyTel failed to perform work. Charter has the burden of proving issues under this complaint.⁵⁰ The Commission concludes that Charter has not met its burden in this regard.

Miscellaneous Charges

Charter complains that CenturyTel has billed Charter for items that clearly constitute a billing error. The charges included items such as long distance charges, directory assistance, caller ID and other charges accrued by end-users.⁵¹ CenturyTel explains that during a period of time between when a porting request is made and the port actually occurs, the ported customer accrues charges. Because Charter has ported that number, the charge shows up on Charter's bill.⁵²

Charter admits that some of these charges have been removed from its account, but others have not. Charter goes on to state that it is not possible to calculate precisely whether the account has been properly credited.⁵³ CenturyTel, however, insists that Charter has been properly credited⁵⁴ but goes on to state that it has discovered that there were some charges for which credits have not yet been applied.⁵⁵ CenturyTel also believes that Charter has received credits for payments Charter did not make.⁵⁶ Finally, CenturyTel and Charter both agree that

⁴⁸ *Southwestern Bell Tel. Co. v. Connect Commun. Corp.* 225 F3d 942, 947 (8th Cir. 2000).

⁴⁹ See Schedule 1, attached to Schremp Direct.

⁵⁰ *Southwestern Bell Tel. Co. v. Connect Commun. Corp.* 225 F3d 942, 947 (8th Cir. 2000).

⁵¹ Schremp Direct, p. 11, lines 17-24.

⁵² Tr. 286, line 21 – 287, line 17.

⁵³ Schremp Direct, p. 12, lines 10-13.

⁵⁴ Hankins Direct, p. 8, lines 21 – p. 9, line 2 and Hankins Rebuttal, p. 2, lines 9-10.

⁵⁵ Hankins Direct, p. 6, lines 17-21.

⁵⁶ Hankins Direct, p. 8, lines 18-19.

this problem is an ongoing concern.⁵⁷

Ultimately, Charter and CenturyTel are both uncertain of whether improper charges have been properly credited. What both parties agree on is that this is an ongoing concern. The Commission, like the parties, is unable to see a clear, immediate resolution to this issue. Charter has the burden of proving issues under this complaint.⁵⁸ The Commission concludes that Charter has not met its burden in this regard.

DECISION

Companies may agree to set a charge for porting requests but the parties in this case, have not agreed to do so. The Commission therefore concludes that charges associated with porting telephone numbers are not authorized by the parties' Agreement or those documents to which the Agreement refers.

The Commission concludes that federal law neither mandates nor prohibits a charge for carrier-to-carrier porting requests.

The Commission finds that Charter has complied with the requirements under the Agreement to preserve the right to recover the disputed charges. Having concluded that charges are not allowed under the Agreement between Charter and CenturyTel, the Commission concludes that CenturyTel must refund to Charter \$68,867.61 paid by Charter to CenturyTel for number porting requests.

Finally, the Commission concludes that Charter has not shown that CenturyTel is at fault for any lack of records searches and listings nor that CenturyTel owes credit for monthly recurring charges or miscellaneous charges.

THE COMMISSION ORDERS THAT:

1. Charges associated with the porting of telephone numbers are not authorized under the Interconnection Agreement between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC.
2. CenturyTel of Missouri, LLC shall refund \$68,867.61 to Charter Fiberlink, LLC, paid by Charter to CenturyTel for porting requests.
3. Federal law neither precludes nor mandates charges for porting requests.

⁵⁷ Tr. p. 289-290 and Tr. p. 313 -314.

⁵⁸ *Southwestern Bell Tel. Co. v. Connect Commun. Corp.* 225 F3d 942, 947 (8th Cir. 2000).

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4. Charter Fiberlink-Missouri, LLC is denied all other relief.
5. This order shall become effective on October 31, 2008.
6. This case may be closed on November 1, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur and
certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 21st day of October, 2008.

**In the Matter of the Joint Application of Stoddard County Sewer
Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri
Public Service Commission for an Order Authorizing Stoddard
County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co.,
L.L.C., and for an Interim Rate Increase***

*Case No. SO-2008-0289
Decided: October 23, 2008*

Sewer §1. The Commission approved the transfer of assets from Stoddard County Sewer Company, Inc., to R.D. Sewer Co., L.L.C. after determining the transfer would not be detrimental to the public interest.

REPORT AND ORDER

APPEARANCES

Stephen W. Holden, 718 West Business Highway 60, Dexter, Missouri 63841-0633, and **Terry C. Allen**, 314 Monroe, P. O. Box 1702, Jefferson City, Missouri 65102, for: **Stoddard County Sewer Company, Inc. and R.D. Sewer Company, L.L.C.**

Steven Reed, Chief Litigation Attorney, **Keith R. Krueger**, Deputy General Counsel, General Counsel, and **Shelly E. Syler-Brueggemann**, Senior Counsel, Governor Office Building, 200 Madison Street, P.O. Box 360, Jefferson City, Missouri 65102, for: **Stoddard County Sewer**

*The case was appealed to the Missouri Court of Appeals (WD) and was dismissed as moot. See 328 SW 3d 347. (Mo. App. W.D. 2010)

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Company, Inc. and R.D. Sewer Company, L.L.C.

Michael Dandino, Deputy Public Counsel and **Christine Baker**, Assistant Public Counsel, Office of the Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for: **Office of the Public Counsel and the Public.**

REGULATORY LAW JUDGE: Harold Stearley

Syllabus: The order: (1) concludes that the Applicants have met their burden of proof of demonstrating that the proposed transfer of assets is not detrimental to the public interest; (2) approves and authorizes the requested transfer of assets, subject to certain conditions; (3) to the extent required by law, authorizes the transfer of stock along with the transfer of assets; (4) establishes a cost structure for determination of interim rates and approves those rates; (4) declares void all security interests executed on the assets of Stoddard County that lack Commission approval; and, (5) directs additional filings to be made by Stoddard County and R. D. Sewer.

I. Procedural History

On March 4, 2008,¹ pursuant to Sections 351.476, 393.190 and Commission Rules 4 CSR 240-2.060, 3.305 and 3.310, Stoddard County Sewer Company, Inc. ("Stoddard County"), R. D. Sewer Co., L.L.C. ("R. D. Sewer") and the Staff of the Missouri Public Service Commission ("Staff") (together, the "Applicants") filed a Joint Application for an order authorizing Stoddard County to transfer its assets to R. D. Sewer and to approve an interim rate increase. Applicants also seek to have the certificates of convenience and necessity ("CCN") issued to Stoddard County in Case Nos. SA-79-11 and SA-86-115 canceled and to have a new CCN issued to R. D. Sewer authorizing it to provide sewer service to the areas heretofore served by Stoddard County. Applicants further request the Commission to issue an order declaring void any and all transfers of a security interest in the assets of Stoddard County that lack Commission approval.

A. Notice and Interventions

On March 5, the Commission issued notice and set an intervention deadline for March 25. No other person, group or entity

¹ All dates throughout this order refer to the year 2008 unless otherwise noted.

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intervened. The Commission's Staff, unique to this situation, joined the sewer companies' application.

Also on March 5, the Commission directed the Missouri Department of Natural Resources ("DNR") to file a compliance report indicating whether Stoddard County was in compliance with DNR's requirements regarding the provision of sewer service. The Commission further directed DNR to inform the Commission what steps Stoddard County had taken to remedy any noncompliance with DNR regulations. DNR filed its report on April 21.

B. DNR's Compliance Report

The DNR reports that Stoddard County Sewer is significantly out of compliance of the Missouri Clean Water Law, its implementing regulations and its Missouri State Operating Permit ("MSOP" No. MO-0096881) based upon the following:²

Notice of Violation #17390 SE - July 30, 1998

- Failed to submit timely discharge monitoring reports as required in part "A" of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo, and 10 CSR 20-7.015(9)(A)1.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1 (3) and 644.076.1, RSMo.
- Discharged water contaminants into waters of the state which reduced the quality of such waters below the Water Quality Standards established by the Missouri Clean Water Commission in violation of Sections 644.051.1(2) and 644.076.1, RSMo, and 10 CSR 20-7.031 or applicable subsection of 10 CSR 20-7.031.
- Failed to submit annual sludge reports as required by the standard conditions of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.

Notice of Violation #17514 SE - May 17, 1999

- Failed to submit timely discharge monitoring reports as required in part "A" of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo, and 10 CSR 20-7.015(9)(A)1.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Discharged water contaminants into waters of the state which

² See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

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reduced the quality of such waters below the Water Quality Standards established by the Missouri Clean Water Commission in violation of Sections 644.051.1(2) and 644.076.1, RSMo, and 10 CSR 20-7.031 or applicable subsection of 10 CSR 20-7.031.

- Failed to submit annual sludge reports as required by the standard conditions of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to retain a certified operator to supervise the operation and maintenance of the waste water treatment facility in violation of Section 644.076.1, RSMo, and 10 CSR 20-9.020(2)(B) and (D).
- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881 in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Placed or caused or permitted to be placed water contaminant in a location where it is reasonably certain to cause pollution of waters of the state in violation of Sections 644.051.1(1) and 644.076.1, RSMo.
- On April 26, 1999, operated, used or maintained a water contaminant source (a bypass from a collection pipe) which discharged to waters of the state, without a MSOP in violation of Sections 644.051.2 and 644.076.1, RSMo, and 10 CSR 20-6.010(1)(A) and (5)(A).

Notice of Violation #17819 SE - February 19, 2003

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881, during the month of December 2002, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Notice of Violation #17602 SE - June 9, 2003

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881, during the months of January, February, and March 2003, in violation of Sections 644.051.1 (3) and 644.076.1, RSMo.

Notice of Violation #17945 SE - August 26, 2003

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881, during the month of April 2003, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Notice of Violation #18112 SE - June 8, 2004

- Failed to prevent a bypass as required by the Standard Conditions Part I MSOP No. MO 0096881 in violation of Section 644.076.1, RSMo.

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- Failed to notify the department of a bypass as required by the Standard Conditions Part I MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Placed or caused or permitted to be placed water contaminant in a location where it is reasonably certain to cause pollution of waters of the state in violation of Sections 644.051.1(l) and 644.076.1, RSMo.

Notice of Violation #18151 SE - January 27, 2005

- Failed to prevent a bypass as required by the Standard Conditions Part I MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to notify the department of a bypass as required by the Standard Conditions Part I MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Placed or caused or permitted to be placed water contaminant in a location where it is reasonably certain to cause pollution of waters of the state in violation of Sections 644.051.1(1) and 644.076.1, RSMo.

Notice of Violation #18172 SE - March 8, 2005

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO 0096881, during the months of January, March, April, May, June, July, September, October, November, and December 2004, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Notice of Violation #18199 SE - June 15, 2005

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of January, February, and March 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Notice of Violation #18210 SE - September 6, 2005

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881, during the months of April, May and June 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

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Notice of Violation #18361 SE - November 23, 2005

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881, during the months of July, August and September 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Notice of Violation #18385 SE - January 30, 2006

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO- 0096881, during the months of October, November and December 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Notice of Violation #18399 SE - September 28, 2007

- **Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881**, during the months of December 2006, January, February, March, April, May and June 2007, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Finally, DNR reports that Monthly Discharge Monitoring Reports submitted to the Department pursuant to MSOP No. MO-0096881 document that Stoddard County Sewer Co., Inc. has failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of December 2007 and January and February 2008, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Stoddard County did not file a response to the DNR's Compliance Report; however, Staff, in response to the Commission's order directing a report be filed,³ confirmed a number of these violations including violation numbers: 17819 SE, 17602 SE, 17945 SE, 18151 SE, 18172 SE, 18199 SE, 18210 SE, 18361 SE, and 18399 SE.⁴

On August 4, 2008, Stoddard County and R. D. Sewer filed their statement of positions on the issues in this matter.⁵ In that pleading, Stoddard County and R. D. Sewer represented that any existing DNR compliance issues would be addressed by a compliance schedule negotiated with DNR and the Missouri Office of the Attorney General without penalty ("AG"). Consequently, the Commission directed the Applicants to file: (1) status reports regarding these negotiations; (2) the compliance schedule once it was formalized with the DNR and AG; and (3) status reports regarding the implementation of the compliance

³ See EFIS Docket No. 3, *Order Directing Staff to File a Report*, issued March 26, 2008.

⁴ EFIS Docket No. 4, *Response to Order Directing Staff to File a Report*, filed April 4, 2008.

⁵ EFIS Docket Number 33, *Statement of Positions on Issues of Stoddard County Sewer Company, Inc., and R.D. Sewer Co, LLC Private Joint Applicants*, filed August 4, 2008.

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schedule.⁶ In its most recent status report, Stoddard County and R. D. Sewer indicated that the DNR was waiting until this case was resolved before completing its negotiation of the compliance schedule with the companies.⁷

C. Commission's Retention of Neutral Subject Matter Experts

On April 8, because the Commission's Staff joined the companies as one of the applicants in this matter, the Commission appointed a Special Master to assist the Commission with retaining outside experts to provide a neutral analysis of Stoddard County's financial condition and the physical condition of its sewer facilities.⁸ The Commission requires this information in order to render a decision regarding the Applicants' requests for approval of the transfer of assets and approval of the interim rate increase. The analyses were to include not only the findings and analyses from the experts, but also any recommendations concerning conditions the Commission should impose to ensure that granting the relief sought by the Applicants would be in the public interest.

On June 4, the Special Master issued notice of the retention of the experts utilizing the "Requests for Proposals" process. The accounting analysis was contracted to be performed by business and accounting professionals with The Bonadio Group, 171 Sully's Trail, Ste. 201, Pittsford, NY 14534.⁹ The engineering assessment was contracted to be performed by civil engineering professionals with S.H. Smith & Co.,

⁶ EFIS Docket Number 37, *Order Directing Stoddard County Sewer Company, Inc. and R.D. Sewer Co., L.L.C. to Provide Status Reports*, issued August 5, 2008.

⁷ EFIS Docket Number 50, *Quarterly Status Report of Private Joint Applicants*, filed August 29, 2008.

⁸ EFIS Docket Number 6, *Order Appointing Special Master for Retaining Outside Experts*, issued April 8, 2008; EFIS Docket Number 13, *Order Adopting Procedural Schedule*, issued April 25, 2008; EFIS Docket Number 18, *Notice Regarding Retention of Neutral Outside Experts*, issued June 4, 2008; EFIS Docket Number 20, *Order Modifying Procedural Schedule*, issued June 5, 2008; EFIS Docket Number 24, *Notice Regarding Outside Experts' Reports and Order Directing Filing*, issued July 2, 2008; EFIS Docket Number 25, *Report on Joint Application of Stoddard County Sewer Company, Inc. R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service*, filed July 9, 2008; EFIS Docket Number 26, *Preliminary Engineering Report*, filed July 9, 2008; EFIS Docket Number 29, *Order Modifying Procedural Schedule*, issued July 10, 2008; EFIS Docket Number 31, *Order Adopting List of Issues, Order of Opening Statements, List and Order of Witnesses and Order of Cross-Examination, and Notice Advising Parties and Witnesses Regarding How to Participate in the Evidentiary Hearing by Phone*, issued August 1, 2008; Transcript, pp. 33-106.

⁹ The principals involved with the project were Monisha Nabar and Randy Shepard.

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Inc., 901 Vine St., P.O. Box 72, Poplar Bluff, MO 63902.¹⁰

A deadline for June 30 was set for the reports to be completed and filed with the Commission. However, due to slight delays with the completion and filing of the reports, the reports were not formally filed in the Commission's Electronic Filing and Information System ("EFIS") until July 9.¹¹

D. Local Public Hearing

The Commission held a local public hearing in this matter on June 4. At the public hearing, the Commission heard the sworn testimony of four witnesses. Of particular note to the Commission was the testimony of Mr. Matt Mills.¹² Mr. Mills testified that he represented the Maco Company ("Maco"), a company that owns and manages commercial and residential properties.¹³ Mr. Mills stated that 51 of Stoddard County's customers are people who reside in apartments his company rents.¹⁴ Maco pays the residents' sewer bills directly to Stoddard County, but passes that cost through to the residents on their rent.¹⁵

Mr. Mills testified that Maco, over a period of two to three years, lent approximately \$15,000 to Stoddard County for repair, overhauling, and replacement of grinder pumps necessary for the sewer system's proper functioning.¹⁶ Mr. Mills testified that he held this loan in the form of an unsecured note.¹⁷ Mr. Mills supported the approval of transfer of assets and supported the approval of a rate increase for Stoddard County.¹⁸

Of the four witnesses testifying,¹⁹ none expressed any dissatisfaction with the service they receive or with how the company bills its customers.²⁰ All four witnesses supported a rate increase for Stoddard County, but two of the four witnesses objected to the company being allowed to double its rates.²¹

¹⁰ The engineers involved with the project were Rodger Williams and Steve Hicks.

¹¹ See Footnote 8.

¹² Transcript, Volume 2, pp. 15-20.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* In addition to Mr. Mills, Don Gard, Wayne Worthington, and Marvin Wheeler provided testimony at the Local Public Hearing.

²⁰ *Id.*

²¹ *Id.*

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E. Procedural Schedule, Hearing Dates and Issues List

On April 25, 2008, the Commission adopted a procedural schedule in this matter culminating with an evidentiary hearing to be held on July 1-2. In that same order the Commission stated that it recognized that the schedule for the hearing dates was dependent on the provision of the reports of the outside experts that the Commission retained. Because the Commission's retained experts' reports were not formally filed until July 9, the Commission ultimately reset the date for the evidentiary hearing until August 13-14.

On July 31, the parties unanimously filed and agreed to the following proposed issues list. The parties asserted that these issues needed to be resolved in order for the Commission to make its decision in this case. That proposed list was as follows:

1. Is the proposed transfer of assets detrimental to the public?
2. Did Stoddard County or any other entity, at any time since Stoddard County acquired the real and personal assets described in Paragraphs 42 and 43 of the Application, secure from the Commission an order authorizing it to sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber any of the assets that are described in Paragraphs 42 and 43 of the Application?
3. Are any and all purported transfers of any security interest in the assets described in Paragraphs 42 and 43 of the Application in this case therefore void?
4. Should the Commission approve an interim rate increase for the customers who are now served by Stoddard County?
5. If the Commission determines that a rate increase for the customers who are now served by Stoddard County should be approved, how much should the rate increase be?
6. If the Commission determines that a rate increase for the customers who are now served by Stoddard County should be approved, should the Commission make the increased revenues subject to refund?

The Commission adopted this proposed issues list with the caveat that the parties' framing of the issues may not accurately reflect the material issues to this matter under the applicable statutes and rules,

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and it may not include all issues that the Commission finds material to its final decision.²² The Commission also adopted one additional issue, the provision of safe and adequate service. The parties were put on notice that should the Commission find that evidence exists of unsafe or inadequate service, it may elect to authorize its General Counsel to pursue a complaint action or to seek penalties for any established violations of State statutes, Commission rules or the company's tariffs.

F. Pre-Hearing Motions

On August 6, Public Counsel filed a motion in limine asserting that the testimony and reports of the neutral subject matter experts retained by the Commission should be excluded from this proceeding.²³ The Commission notes, that despite its advance notice to all of the parties in this proceeding regarding the retention of these experts (the first notice was issued April 8), no objections were filed by any of the parties regarding their retention, or to the filing of their reports during the months of April, May, June and July. Public Counsel waited until seven days before the scheduled evidentiary hearing was set to begin, or 120 days (3 months and 29 days), after the Commission issued its first of multiple notices (at least nine notices were given)²⁴ regarding the retention of these experts, and 28 days after the filing of the experts' reports, to file its motion in limine.

In its motion in limine, Public Counsel strenuously and ironically argued, despite its acknowledgment that the Commission had a statutory duty to ensure public utilities provide safe and adequate service, that the Commission lacked authority to fulfill that statutory duty and consider the issue of whether Stoddard County was providing safe and adequate service to its customers.²⁵

On August 11, Stoddard County and R.D. Sewer filed its own motion in limine arguing that consideration of the issue of safe and adequate service was not proper in this proceeding and could be

²² EFIS Docket Number 31, *Order Adopting List of Issues, Order of Opening Statements, List and Order of Witnesses and Order of Cross-Examination, and Notice Advising Parties and Witnesses Regarding How to Participate in the Evidentiary Hearing by Phone*, issued August 1, 2008.

²³ EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

²⁴ See Footnote Number 8.

²⁵ EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

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addressed in a subsequent proceeding.²⁶ The Commission denied Public Counsel's motion in limine and Stoddard County's and R. D. Sewer's motion in limine, finding both motions devoid of merit.²⁷

Also on August 11, just two days prior to hearing, Public Counsel filed a motion to dismiss alleging lack of jurisdiction.²⁸ The Commission took that motion with the case to give the parties an opportunity to brief the jurisdictional issue raised, and the Commission shall address that issue in the conclusions of law section of this order.

G. Case Submission and Unanimous Stipulation of Facts

Pursuant to the procedural schedule adopted by the Commission, the evidentiary hearing commenced on August 13 and concluded on the same date, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of six witnesses and received thirteen exhibits into evidence. One of those exhibits, Exhibit 5, was an Unanimous Stipulation of Facts. If appropriate and relevant, the Commission will adopt these agreed to facts, on a fact by fact basis, throughout the Findings of Fact Sections in this order.

Post-hearing briefs and proposed findings of fact and conclusions of law were filed according to the post-hearing procedural schedule. The post-hearing briefs were filed on September 18, and the case was deemed submitted for the Commission's decision on that date.²⁹

2. II. Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making its findings of fact, the Commission is mindful that it is required, pursuant to Section 386.420.2, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Because Section 386.420 does not

²⁶ EFIS Docket Number 42, *Motion in Limine of Stoddard County Sewer Company and R. D. Sewer Co., L.L.C. Private Joint Applicants with Suggestions*, filed August 11, 2008.

²⁷ EFIS Docket Number 45, *Order Denying Stoddard County Sewer Company, Inc. and R. D. Sewer Co., L.L.C.'s Motion in Limine*, issued August 12, 2008; EFIS Docket Number 46, *Order Denying Motion in Limine*, issued August 12, 2008.

²⁸ EFIS Docket Number 44, *Office of the Public Counsel's Motion to Dismiss for Lack of Jurisdiction*, filed August 11, 2008.

²⁹ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

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explain what constitutes adequate findings of fact to support the agency's decision, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.³⁰ Section 536.090 provides, in pertinent part:

3. Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.³¹ Nonetheless, the following formulation is often cited:

4. The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.³²

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."³³ Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."³⁴

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise, and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the fact-finder's

³⁰ *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App. 2000).

³¹ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

³² *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

³³ *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

³⁴ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

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discretion,³⁵ but witness credibility is solely a matter for the fact-finder “which is free to believe none, part, or all of the testimony.”³⁶ A reviewing court lacks authority to weigh the evidence heard by the Commission because the Commission is the fact-finding agency.³⁷

An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.³⁸ In fact, the Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.”³⁹

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.⁴⁰ And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory

³⁵ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a “peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience.” *Id.* In *State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

³⁶ *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

³⁷ *State ex rel. Office of Public Counsel v. Public Service Com’n of Missouri*, 858 S.W.2d 806, 810 -811 (Mo. App. 1993); *State ex rel. Inman Freight Sys., Inc. v. Public Serv. Comm’n*, 600 S.W.2d 650, 654 (Mo. App. 1980).

³⁸ *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); In the Interest of A.H., 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com’n of the State of Mo.*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users’ Ass’n. v. Public Service Com’n of the State of Mo.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Com’n*, 703 S.W.2d 577 (Mo. App. 1986).

³⁹ *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

⁴⁰ *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

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obligations.⁴¹ Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.⁴²

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.⁴³ When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.⁴⁴ Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.⁴⁵

A. The Parties

1. Stoddard County Sewer Company, Inc. ("Stoddard County") is a Missouri corporation that is not in good standing.⁴⁶

2. Stoddard County was administratively dissolved on September 14, 1999, for its failure to file an annual registration report within 30 days after it was due, and the dissolution has not been rescinded.⁴⁷

3. The Secretary of State's records show Stoddard County's registered office is at Highway 60 West, P.O. Box 325, Dexter, MO 63841.⁴⁸ However, Stoddard County's current mailing address is P.O. Box 302, Wappapello, MO 63966, and the street address of Stoddard County's principal office or place of business is at the office of the entity

⁴¹ *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

⁴² *Id.*

⁴³ *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

⁴⁴ *Id.*

⁴⁵ *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

⁴⁶ EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008; Exh. 5, Unanimous Stipulation of Facts.

⁴⁷ *Id.*

⁴⁸ *Id.*

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that owns all of Stoddard County's stock, R. D. Sewer Company, L.L.C. ("R. D. Sewer"), 406 South Allen, Bernie, MO 63822.⁴⁹

4. Although Stoddard County has been dissolved, it is providing sewer service, to approximately 172 customers (115 single family residences and 57 residential apartments) in the Ecology Acres and Western Heights subdivisions and in Grant Apartments (now known as Westbridge Apartments), all of which are located outside the City of Dexter, Missouri.⁵⁰

5. Applicant R. D. Sewer is a Missouri limited liability corporation in good standing, with its principal place of business at 406 South Allen, Bernie, MO 63822 . Its mailing address is P.O. Box 302, Wappapello, MO 63966.⁵¹

6. R. D. Sewer was organized to transact any and all lawful business for which a limited liability company may be organized. It owns all of the stock of Stoddard County, which in turn holds a certificate of convenience and necessity issued by the Commission to provide sewer service to the public near Dexter, Missouri.⁵²

7. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."⁵³ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."⁵⁴

⁴⁹ *Id.*

⁵⁰ *Id.*; EFIS Docket No. 4, *Response to Order Directing Staff to File a Report*, filed April 4, 2008; Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission; Exh. 3, Preliminary Engineering Report.

⁵¹ *Id.*

⁵² Exh. 6, Assignment of Interest in Stoddard County Sewer, Inc., executed June 12, 2002; Exh. 7, Assignment of Interest in Stoddard County Sewer, Inc. and Assignment Order and Receipt, Estate Number 35P070000096, executed June 12, 2002; EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008.

⁵³ Section 386.710(2); Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

⁵⁴ Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic

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8. The General Counsel of the Missouri Public Service Commission “represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”⁵⁵ In this matter the General Counsel represents the position of the Staff of the Missouri Public Service Commission (“Staff”).

B. Witness Demeanor, Credibility and Testimony

9. No prefiled testimony was filed with the Commission pursuant to Commission Rules.⁵⁶ Instead, the Commission conducted a live evidentiary hearing.⁵⁷

10. The following witnesses provided live testimony and were subject to cross-examination by the parties and the Commission:⁵⁸

Rodger Owens (Stoddard County/R. D. Sewer), James A. Merciel, Jr. (Staff), Steve Rackers (Staff), Ted Robertson (Public Counsel), Randall Shepard (Commission), and Rodger G. Williams (Commission).

11. Because the Commission’s Staff joined Stoddard County and R. D. Sewer as a joint applicant in this matter, The Bonadio Group (“Bonadio”) ⁵⁹ and S.H. Smith & Co., Inc., (“Smith & Co.”) ⁶⁰ were retained

development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

⁵⁵ Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

⁵⁶ See Commission Rules 4 CSR 240-2.110, 2.130, and 2.135.

⁵⁷ See Transcript Volume 3.

⁵⁸ *Id.*

⁵⁹ The Bonadio Group is an independent CPA firm based in New York, with its principal business address being 171 Sully’s Trail, Pittsford, New York, 14534-4557. It provides accounting, tax, business advisory and financial services. It has offices in Rochester, Buffalo, Syracuse, Geneva and Perry and serves commercial, small business, public, not-for-profit and individual clients. Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission, filed by Bonadio & Co., L.L.P. on July 9, 2008, EFIS Docket No. 25, formally received into evidence on August 13, 2008; Transcript pp. 36-45. See also www.bonadio.com.

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by the Commission as independent consultants versed in the areas of accounting and engineering, respectively, to provide neutral accounting and engineering analyses of Stoddard County to assist the Commission with its determinations.⁶¹

12. Mr. Randall Shepard provided testimony for Bonadio and Mr. Rodger G. Williams provided testimony for Smith & Co.

13. Although no witness prefiled testimony with the Commission, Mr. Shepard and Mr. Williams filed reports with the Commission prior to the evidentiary hearing to provide all of the parties sufficient time to review those reports prior to the hearing.⁶²

14. The reports filed by Mr. Shepard and Mr. Williams were not offered, received or admitted into the record evidence until the day of the evidentiary hearing.⁶³

1. Witnesses Shepard⁶⁴

15. Mr. Shepard holds a BS degree in Accounting from the State University of New York at Genesco. He is an audit principal (non-equity partner) in Bonadio and is a licensed certified public accountant in the State of New York. He is a member of the American Institute of Certified Public Accountants ("AICPA") and completes continuing professional education in order to maintain license. This includes training on all Financial Accounting Standards Board ("FASB") and Governmental Accounting Standards Board ("GASB") pronouncements, as well as

⁶⁰ Smith & Company, founded in 1968, is based in Poplar Bluff, Missouri. Its staff includes fifteen graduate engineers, two registered land surveyors, and two graduate geologists. The company also has a branch office in Cape Girardeau, Missouri staffed with two graduate engineers, a draftsman, and a civil engineering technician. Its experience in the design and inspection of public works projects includes airports, streets/roads/drainage, bridges, water distribution and treatment systems, wastewater collection and treatment, solid waste management facilities, industrial parks, and environmental remediation projects. Exh. 3, Preliminary Engineering Report; Transcript pp. 84-106. See http://www.shsmithco.com/html/about_us.html.

⁶¹ Transcript pp. 38-39, 86. See Footnote 8. See also the Procedural History section of this order, specifically subsection C entitled: "Commission's Retention of Neutral Subject Matter Experts."

⁶² EFIS Docket Number 13, *Order Adopting Procedural Schedule*, issued April 25, 2008; EFIS Docket Number 24, *Notice Regarding Outside Experts' Reports and Order Directing Filing*, issued July 2, 2008; EFIS Docket Number 25, *Report on Joint Application of Stoddard County Sewer Company, Inc. R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service*, filed July 9, 2008 (Exh. 1); EFIS Docket Number 26, *Preliminary Engineering Report*, filed July 9, 2008 (Exh. 3); EFIS Docket Number 29, *Order Modifying Procedural Schedule*, issued July 10, 2008; Transcript pp. 45-46, 92-94.

⁶³ Transcript pp. 45-46, 92-94.

⁶⁴ Transcript pp. 33-84.

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Auditing Standards Board regulations. He is also a Fellow in the Health Care Financial Management Association.⁶⁵

16. Mr. Shepard has been employed with Bonadio in his current capacity for 11 years. Prior to working for Bonadio, he worked as a financial analyst for a local hospital in New York. He completes stringent requirements on an annual, biannual and triennial basis for AICPA as well as New York state licensure purposes. He is responsible for overseeing any type of engagement from audits to compilation reviews, consulting engagements for municipalities, public authorities, including water and sewer utilities, as well as not-for-profit or other organizations.⁶⁶

^{17.} Mr. Shepard has conducted approximately 200 to 300 audits for business and other entities such as New York towns and counties, public authorities, which include transportation authorities, water and sewer funds, not-for-profit organizations, including nursing homes, hospitals, health and human service type organizations, as well as commercial organizations such as regional professional organizations such as a baseball team and those types of engagements.⁶⁷

18. Mr. Shepard has not received any formal utility operation or regulatory ratemaking theory and concept education. He has not provided any previous written or oral testimony in Federal or State regulated utility cases.⁶⁸

^{19.} To produce his report for the Commission, Mr. Shepard performed an onsite review. Steven Holden (one of the attorneys representing Stoddard County and R. D. Sewer) and Rodger Owens, the operator of Stoddard County, provided supporting documentation, including invoices, annual Commission reports, check registers, and customer ledger cards. Mr. Shepard interviewed both Rodger Owens and LaDawn Owens, (who assists with the company's operations) with regard to the expenses and budget information associated with operating Stoddard County.⁶⁹

^{20.} When preparing his audit (limited review),⁷⁰ Mr. Shepard applied and relied upon what is considered to be the generally accepted

⁶⁵ Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 34.

⁶⁹ Exhs. 1, Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

⁷⁰ A "limited review" is not as detailed as a full audit or full investigation of a company. Transcript p. 53.

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accounting methods of his profession.⁷¹

^{21.} Mr. Shepard was aided by Monisha Nabar⁷² and Mark Laskoski⁷³ with preparing his report, but he is the primary author of the report and takes responsibility for all of the contents of the report and verifies its accuracy and correctness.⁷⁴

22. The Commission did not direct Mr. Shepard in any manner with regard to reaching any particular outcome when he prepared this report.⁷⁵

23. The Commission did not, in anyway, ask Mr. Shepard to revise his report once it was submitted to the Commission.⁷⁶

24. Mr. Shepard provided his testimony to the Commission by telephone.⁷⁷

25. Although the Commission was unable to visualize Mr. Shepard, it was able to evaluate his speech, including such characteristics as pitch, flow, volume, accent, inflection, intonation, intensity, emotion, fluctuation, temporal breaks and pauses, the context of responses, and the witness's overall responsiveness to questions.

26. Mr. Shepard was calm, composed, confident, sincere, and unwavering in his testimony.⁷⁸

27. When providing his testimony, Mr. Shepard was direct and articulate with his responses, and his live hearing testimony was

⁷¹ Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

⁷² Monisha Nabar, Principal – Ms. Nabar is a principal (non-equity partner) of Bonadio. She has an MBA, is a Chartered Accountant and a Certified Fraud Examiner. Her educational training and twenty years of experience is consistent with the consulting services she provides for the firm. She has assisted government clients in setting rates for various services including sewer. She has not had any specific regulated utility operation and ratemaking education or training. There have been no Federal or State regulated utility cases wherein she has provided written or oral testimony. See Exh. 2, Public Counsel Data Request No. 1003.

⁷³ Mark Laskoski – Mr. Laskoski is a staff level consultant at Bonadio. He holds a four-year degree, but is not a certified public accountant. The training received has been provided in-house and under the direction of his immediate supervisors, based on the nature of the assignments he is given. He has not had any specific regulated utility operation and ratemaking education or training. There have been no Federal or State regulated utility cases wherein he has provided written or oral testimony. See Exh. 2, Public Counsel Data Request No. 1003.

⁷⁴ Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

⁷⁵ Transcript p. 33-45.

⁷⁶ *Id.*

⁷⁷ Transcript, p. 32.

⁷⁸ Exhs. 1, Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript pp. 33-84.

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consistent with the Report he filed with the Commission.⁷⁹

28. Mr. Shepard provided extensive documentary support with regard to his positions on the subject matter of his testimony, via the report he prepared for the Commission.⁸⁰

29. The testimony provided by Mr. Shepard was substantial and credible.⁸¹

2. Witness Williams⁸²

30. Mr. Williams received his Bachelor of Science Degree in Civil Engineering from Arkansas State University in 2002. He is a Registered Professional Engineer in the state of Missouri and holds certification from the American Concrete Institute ("ACI") as a Concrete Field Testing Technician, and has complete training in Nuclear Gauge Safety. He is a member of the American Society of Civil Engineers ("ASCE"), the National Society of Professional Engineers ("NSPE") and the Missouri Society of Professional Engineers ("MSPE"). He is required to earn 30 hours of continuing education every two years.⁸³

31. Mr. Williams is employed by Smith & Co, in the capacity of Project Manager/ Project Engineer/Construction Inspector. His six years of professional experience in civil engineering with Smith & Co. involves a broad range of project experience including: water treatment, supply, distribution, and storage design; wastewater collection, pumping, and treatment design; wastewater disinfection; site development and planning; traffic design including, streets, roads, and bridges; preliminary engineering reports for various projects; construction inspection of various projects; airport ramp, runway and taxiway and fuel facilities. He is experienced in project and construction management, contract administration, and cost control on projects with engineering and construction costs over \$1 million. He is also experienced in Missouri DNR, National Pollutant Discharge Elimination system ("NPDES"), Clean Water Act Section 404 and other permitting.⁸⁴

32. Mr. Williams provided the Commission with an extensive list of projects that he has participated in involving Water Supply Treatment, Distribution and Storage, and Wastewater Collection, Pumping and

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Transcript, pp. 33-84.

⁸² Transcript, pp. 84-106.

⁸³ Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript, pp. 83-94.

⁸⁴ *Id.*

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Storage.⁸⁵

33. Mr. Williams has not received any formal utility operation or regulatory ratemaking theory and concept education. He has not provided any previous written or oral testimony in Federal or State regulated utility cases; however he is well-versed in Missouri Statutes and Missouri Public Service Commission rules and regulations that govern the operation and ratemaking of Missouri regulated utilities.⁸⁶

^{34.} To produce his report for the Commission, Mr. Williams performed an onsite review of Stoddard County, reviewed files obtained from the DNR and reviewed all files obtainable from Stoddard County.⁸⁷

35. Mr. Williams was unable to obtain detailed drawings of the existing sewer lines for his review, but he stated that he had all necessary materials to prepare his analysis.⁸⁸

^{36.} When preparing his engineering assessment, Mr. Williams applied and relied upon what is considered to be the generally accepted methods of his profession.⁸⁹

^{37.} Mr. Williams was aided by senior engineer Dan Molloy⁹⁰ and junior engineer Jacob Ortega⁹¹ with preparing his report, but he is the primary author of the report and takes responsibility for all of the contents

⁸⁵ *Id.*

⁸⁶ Transcript, p. 93.

⁸⁷ Exh. 3, Preliminary Engineering Report; Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript p. 83-94.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Mr. Molloy earned a Bachelor of Science Degree in civil Engineering from the University of Missouri-Rolla in 1976. He is a member of the National Society of Professional Engineers and Missouri Society of Professional Engineers. He is currently employed by Smith & Co. as a Project Engineer. Mr. Molloy has over thirty-two years of professional experience in civil engineering. His broad range of project experience includes: water treatment, distribution, and storage design; wastewater collection, pumping, and treatment design; water and wastewater disinfection, computer modeling of water systems; site planning and design; geotechnical exploration and foundation design; soil property characterization and laboratory testing; bridge design; and design and construction of gas spill remediation systems. His teaching experience includes: instructor of basic engineering courses at local community college; and director of water and wastewater related seminars. He is experienced in project management, contract writing and administration, and cost control.

⁹¹ Mr. Ortega earned an Associate of Science Degree in Physical and Natural Science from San Antonio College in San Antonio, Texas. He earned a Bachelor of Science Degree in Civil Engineering from University of Texas at San Antonio in 2003. He was recognized as Engineer-In-Training (EIT) by Texas Board of Professional Engineers in 2007 and is currently employed by Smith & Co. as a Design Engineer.

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of the report and verifies its accuracy and correctness.⁹²

38. The Commission did not direct Mr. Williams in any manner with regard to reaching any particular outcome when he prepared this report.⁹³

39. The Commission did not, in any way, ask Mr. Williams to revise his report once it was submitted to the Commission.⁹⁴

40. Mr. Williams provided his testimony to the Commission by telephone.⁹⁵

41. Although the Commission was unable to visualize Mr. Williams, it was able to evaluate his speech, including such characteristics as pitch, flow, volume, accent, inflection, intonation, intensity, emotion, fluctuation, temporal breaks and pauses, the context of his responses, and the witness's overall responsiveness to questions.

42. Mr. Williams was calm, composed, confident, sincere, and unwavering in his testimony.⁹⁶

43. While providing his testimony, Mr. Williams was direct and articulate with his responses, and his live hearing testimony was consistent with the report he filed with the Commission.⁹⁷

44. Mr. Williams provided extensive documentary support with regard to his positions on the subject matter of his testimony, via the report he prepared for the Commission.⁹⁸

45. The testimony provided by Witness Williams was substantial and credible.⁹⁹

3. Witness Owens¹⁰⁰

46. Mr. Rodger Owens holds one-hundred percent ownership of R. D. Sewer. He has either worked for, or owned and operated, water and wastewater systems since 1976. He has been a licensed operator of these types of systems since 1986. In addition to R. D. Sewer, he owns Oakbriar Water Company, Lakeland Heights Water Company, and Whispering Hills Water Company.¹⁰¹

⁹² Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript p. 83-94.

⁹³ Transcript pp. 83-94.

⁹⁴ *Id.*

⁹⁵ Transcript, p. 83.

⁹⁶ Transcript pp. 84-106.

⁹⁷ Exh. 3, Preliminary Engineering Report; Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript pp. 84-106.

⁹⁸ *Id.*

⁹⁹ Transcript, pp. 84-106.

¹⁰⁰ Transcript, pp. 106-161.

¹⁰¹ Transcript pp. 106-108.

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47. Mr. Owens provided the Commission with extensive information regarding the operation of, and the condition of, Stoddard County.¹⁰²

48. When providing his testimony, Mr. Owens was calm, direct, articulate, composed, confident, sincere, and unwavering. The testimony provided by Witness Owens was substantial and credible.¹⁰³

4. Witness Merciel¹⁰⁴

49. Mr. James A. Merciel, Jr. is employed by the Missouri Public Service Commission as an Assistant Manager of Engineering in the Water and Sewer Department. He has been employed with the Commission for approximately 31 years and has held his present title for approximately 28 or 29 of those years. Mr. Merciel has extensive familiarity with Stoddard County, having dealt with the owners and operators of the company for many years and having supervised one of the Commission's field inspectors who was involved with Stoddard County's prior proceedings before the Commission. While Staff did not submit Mr. Merciel's full resume to the Commission in this matter, he has participated in numerous cases before this Commission.¹⁰⁵

50. Mr. Merciel provided the Commission with extensive information regarding the operation and condition of Stoddard County, as well as the history surrounding a rate increase application for the company that was filed (and subsequently dismissed) in 2002.¹⁰⁶

51. When providing his testimony, Mr. Merciel was calm, direct, articulate, composed, confident, sincere, and unwavering. The testimony provided by Witness Merciel was substantial and credible.¹⁰⁷

5. Witness Rackers¹⁰⁸

52. Mr. Steve Rackers is employed by the Missouri Public Service Commission as a Regulatory Auditor V. His duties include assisting the manager, and other Auditor Vs of the auditing department, with

¹⁰² Transcript, pp. 106-161.

¹⁰³ *Id.*

¹⁰⁴ Transcript, pp. 161-194.

¹⁰⁵ Transcript, pp. 161-163. James A. Merciel, Jr. is employed by the Missouri Public Service Commission ("Commission") as a Utility Regulatory Engineering Supervisor, in the Water and Sewer Department ("W/S Department"). He graduated from the University of Missouri at Rolla in 1976 with a Bachelor of Science degree in Civil Engineering. He is a Registered Professional Engineer in the State of Missouri. He worked for a construction company in 1976 as an engineer and surveyor, and has worked for the Commission in the W/S Department since 1977. He has presented testimony in numerous cases before the Commission. See Mr. Merciel's Direct Testimony in Case No. WR-2007-0216.

¹⁰⁶ Transcript, pp. 161-194.

¹⁰⁷ *Id.*

¹⁰⁸ Transcript, pp. 194-206.

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supervision the operations of the Commission's St. Louis office. He also supervises the activities of the junior auditors assigned to that office and leads supervised audits of utility companies. His duties include conducting audits of small company rate increase requests and maintaining the custody and control of records in those cases. The St. Louis office conducted an audit of Stoddard County Sewer Company in 2002, and Mr. Rackers' office maintained the records and work papers from that case. While Staff did not submit Mr. Rackers' full resume to the Commission in this matter, he has participated in numerous cases before this Commission.¹⁰⁹

53. Mr. Rackers provided the Commission with information regarding the Stoddard County rate increase application that was filed, and subsequently dismissed, in 2002. More specifically his testimony addressed the 2002 Staff audit of the company.¹¹⁰

54. Mr. Rackers provided his testimony to the Commission by telephone.¹¹¹

55. Although the Commission was unable to visualize Mr. Rackers, it was able to evaluate his speech, including such characteristics as pitch, flow, volume, accent, inflection, intonation, intensity, emotion, fluctuation, temporal breaks and pauses, the context of responses, and the witnesses overall responsiveness to questions.

56. When providing his testimony, Mr. Rackers was calm, direct, articulate, composed, confident, sincere, and unwavering. The testimony provided by Mr. Rackers was substantial and credible.¹¹²

6. Witness Robertson¹¹³

57. Mr. Ted Robertson is employed by the Missouri Office of the Public Counsel in the capacity of Regulatory Accountant III. He has been employed by the Public Counsel since July of 1990. He holds a Bachelor of Science Degree in Accounting and is licensed as a Certified

¹⁰⁹ Transcript, pp. 193-202. Mr. Rackers attended the University of Missouri – Columbia, where he received a Bachelor of Science degree in Business Administration with a major in Accounting in 1978. He has passed the Uniform Certified Public Accountant examination and he is licensed to practice in the state of Missouri. His duties include conducting and assisting with the audits and examinations of the books and records of utility companies operating within the state of Missouri. He has testified numerous times before the Commission. The schedule of cases he included with this testimony in Case No. WR-2007-0216 lists 28 cases in which he provided testimony. See Direct Testimony filed in Case No. WR-2007-0216 and accompanying schedules.

¹¹⁰ Transcript, pp. 194-206.

¹¹¹ Transcript, pp. 193-194.

¹¹² Transcript, pp. 194-206.

¹¹³ Transcript, pp. 206-282.

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Public Accountant in Missouri. He has attended numerous seminars and training conferences in the areas of regulatory ratemaking and accounting. While Public Counsel did not submit Mr. Robertson's full resume to the Commission in this matter, he has participated in numerous cases before this Commission.¹¹⁴

58. Mr. Robertson provided the Commission with testimony concerning the accounting analysis provided to the Commission by Bonadio and provided his recommendations regarding approval of, and the appropriate amount of, an interim rate increase for Stoddard County.¹¹⁵

59. Mr. Robertson based his testimony upon a review of Staff's 2002 audit, the work papers that Staff had produced, Bonadio's report and work papers, Smith & Co.'s report and work papers, but primarily Stoddard County's 2007 Annual Report.¹¹⁶

60. Mr. Robertson has not operated a water or sewer company, and other than reviewing documents, he evaluates these companies by on-site inspections and watching the operators perform their duties.¹¹⁷

61. Mr. Robertson was not involved in the Stoddard County 2002 rate case.¹¹⁸

62. Mr. Robertson did not perform an on-site inspection of Stoddard County Sewer Company.¹¹⁹

63. There is no evidence in the record that Mr. Robertson interviewed Rodger or LaDawn Owens, when preparing his accounting analysis of the company.

¹¹⁴ Transcript, pp. 206-207. Ted Robertson is employed by the Missouri Office of the Public Counsel as a Public Utility Accountant III. He graduated from Southwest Missouri State University in Springfield, Missouri, with a Bachelor of Science Degree in Accounting. In November, 1988, he passed the Uniform Certified Public Accountant ("CPA") Examination, and obtained CPA certification from the State of Missouri in 1989. My Missouri CPA license number is 2004012798. Under the direction of the OPC Chief Public Utility Accountant, Mr. Russell W. Trippensee, he is responsible for performing audits and examinations of the books and records of public utilities operating within the State of Missouri. See Mr. Robertson's Direct Testimony filed in Case No. ER-2006-0315. In that case Mr. Robertson provided a schedule listing approximately 56 cases before the Commission in which he participated.

¹¹⁵ Transcript, pp. 206-282.

¹¹⁶ Transcript, p. 207, 210-211, 227, 229, 237-238, 246, 248. Curiously, Public Counsel challenged the accuracy of the annual reports while at the same time maintaining the position that they are presumed to be true and accurate. Transcript, pp. 120-121, 160, 213, 217-218, 251, 257.

¹¹⁷ Transcript, p. 223.

¹¹⁸ Transcript, p. 208.

¹¹⁹ Transcript, pp. 221-222.

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64. Mr. Robertson, similar to Mr. Shepard, did not perform a full audit of Stoddard County, but rather performed a limited review.¹²⁰

65. While on the witness stand, Mr. Robertson was composed, confident, and sincere. Although he was articulate, at times Mr. Robertson was defensive and evasive and frequently would not answer questions directly or would not answer the question that was asked.¹²¹

66. Mr. Robertson's defensiveness and evasiveness did not diminish the credibility of all of his answers, but it did diminish some of his credibility with regard to specific questions.

67. Public Counsel did not proffer a witness to provide an engineering analysis of Stoddard County to the Commission.

C. Evidentiary Issues Raised by Public Counsel

Public Counsel raised objections prior to and during the evidentiary hearing that were directed toward excluding the testimony and reports offered by witnesses Shepard and Williams based upon an assertion that these witnesses: (1) were not qualified experts in regulated utilities; (2) that their testimony and reports were hearsay; and (3) they were biased.¹²² The Commission makes the following findings with regard to Public Counsel's objections.

1. Subject Matter Experts

68. Section 490.065 sets forth the standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings.¹²³

69. Section 490.065 states:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand

¹²⁰ Transcript, pp. 252-254, 260-261.

¹²¹ Transcript, pp. 206-282. Many questions directed to Mr. Robertson were yes or no questions, but he would not answer those questions and instead re-characterized the question to provide a different answer. In other instances, he simply would not answer the question at all. His testimony is replete with these types of answers and statements.

¹²² See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with **any** scientific, technical or other specialized knowledge. (Emphasis added). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 2008 WL 2345862, 7 (Mo. App. 2008). The expert is not required to be an expert in all subject matter in order to assist the finder of fact.

¹²³ *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003).

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the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

70. The Commission finds that the following witnesses are subject matter experts for their individual fields of expertise as identified in their live testimony and exhibits admitted into the record:¹²⁴

a. Randall Shepard is a subject matter expert in the field of auditing and accounting because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this

¹²⁴ As with all witnesses and all subject matter expert witnesses, any proven deficiencies in any specific testimony are evaluated in terms of the weight and credibility to be given to that specific testimony. Public Counsel's frequent attempts to completely exclude the testimony and reports of witnesses Shepard and Williams on the basis that they were not qualified experts in regulated utilities were overruled. See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with *any* scientific, technical or other specialized knowledge. (Emphasis added). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 2008 WL 2345862, 7 (Mo. App. 2008). The expert is not required to be an expert in all subject matters in order to assist the finder of fact.

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matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Shepard is not required to have formal training in utility operation or regulatory ratemaking theory and concept education, nor is he required to have prior testimonial experience in Federal or State regulated utility cases in order to assist the Commission with specific determinations in this matter.

b. Rodger G. Williams is a subject matter expert in the field of engineering because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Williams is not required to have formal training in utility operation or regulatory ratemaking theory and concept education, nor is he required to have prior testimonial experience in Federal or State regulated utility cases in order to assist the Commission with specific determinations in this matter.

c. Rodger Owens is a subject matter expert with regard to the operation and condition of Stoddard County Sewer Company, Inc. and R. D. Sewer Co., L.L.C. and is a subject matter expert on the operation and maintenance of water and sewer companies because he possesses scientific, technical and other specialized knowledge from 32 years of experience managing and operating water and wastewater systems that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Owens is not required to have formal training in utility operation or regulatory ratemaking theory and concept education, nor is he required to have prior testimonial experience in Federal or State regulated utility cases in order to assist the Commission with specific determinations in this matter.

d. James A. Merciel, Jr. is a subject matter expert with regard to operation and engineering and maintenance of water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence

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and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.

e. Steve Rackers is a subject matter expert with regard to auditing, accounting and the regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.

f. Ted Robertson is a subject matter expert with regard to auditing, accounting and the regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determine facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Robertson is not a subject matter expert in the field of engineering.

71. Additionally, the Commission finds that regardless of the general witness credibility findings made in Findings of Facts Numbers 9 through 70, a given witness's qualifications and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.¹²⁵

2. Hearsay

72. Hearsay has been defined by Missouri courts as follows:

"Hearsay is an out of court statement made by someone not

¹²⁵ As previously stated: witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

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before the court that is offered to prove the truth of the matter asserted. *State v. Larson*, 941 S.W.2d 847, 854 (Mo. App. 1997). Hearsay is not admissible at trial unless an exception to the hearsay rule applies;.... *Id.*" *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 101 (Mo. App. 2006). Or, as explained in *State v. Mayes*, 868 S.W.2d 541, 544 (Mo. App. 1993), quoting *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981), "Hearsay is defined as 'in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant.'" ¹²⁶

The underlying rationale for the hearsay rule is for the purpose of securing the trustworthiness of the assertions. *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981). Courts generally exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and the fact-finder is not able to judge the declarant's demeanor and credibility as a witness. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. banc 1995). ¹²⁷

73. Although there were hearsay objections made by Public Counsel prior to and during the evidentiary hearing that were directed to excluding the testimony and reports offered by witnesses Shepard and Williams, neither Public Counsel nor any other party to this action identified any "out-of-court" statement being offered into evidence that could be construed to be hearsay. ¹²⁸

3. Bias

74. The term "neutral" is defined as: "Indifferent, unbiased, impartial, not engaged on either side, not taking an active part with either of the contending sides." ¹²⁹

75. The term "independent" is defined as: "Not dependent; not subject to control, restriction, modification, or limitation from a given

¹²⁶ *State v. Freeman*, 212 S.W.3d 173, 175 (Mo. App. 2007).

¹²⁷ *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000).

¹²⁸ See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. The hearsay objection raised by Public Counsel during the evidentiary hearing occurred each time it renewed all of the objections contained in its Motion in Limine filed prior to the evidentiary hearing. See EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

¹²⁹ Black's Law Dictionary, Sixth Dictionary, West Publishing Company, p. 1042 (1990). See also The American Heritage College Dictionary, Third Edition, Houghton Mifflin Company, p. 917 (1997).

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outside source.”¹³⁰

76. The term “bias” is defined as: “inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction.” Bias also means a preference or an inclination that inhibits impartial judgment, or a statistical sampling or testing error caused by systematically favoring some outcomes over others.¹³¹

77. It is well-settled law that evidence of bias is always relevant. Bias does not serve as a basis for exclusion of evidence, but rather goes to a witness’s credibility and the weight of his or her testimony.¹³²

78. It is also well-settled Missouri law that the determination of bias is a factual determination left to the trier of fact, and that the scope of evidence allowable to show interest or bias of witness are matters within discretion of the trier of fact.¹³³

79. Although there were objections made by Public Counsel prior to and during the evidentiary hearing that were directed to excluding the testimony and reports offered by witnesses Shepard and Williams on the basis of their testimony and reports not being neutral or independent, neither Public Counsel nor any other party to this action identified any credible evidence that the testimony and reports offered by witnesses Shepard and Williams were biased in any way.¹³⁴

¹³⁰ Black’s Law Dictionary, Sixth Dictionary, West Publishing Company, p. 770 (1990). See also The American Heritage College Dictionary, Third Edition, Houghton Mifflin Company, p. 690 (1997).

¹³¹ Black’s Law Dictionary, Sixth Dictionary, West Publishing Company, p. 162 (1990). The American Heritage College Dictionary, Third Edition, Houghton Mifflin Company, p. 132 (1997).

¹³² *State v. J.L.S.*, 259 S.W.3d 39, 44 -45 (Mo. App. 2008); *State v. Sandlin*, 703 S.W.2d 48, 50 (Mo. App. 1985). The term “bias” includes all varieties of hostility or prejudice against the opponent personally or of favor to the proponent personally. Evidence showing bias includes circumstances of the witness’s situation that make it probable that he or she has partiality of emotion for one party’s cause. Such circumstances should have a clearly apparent force on the witness as tested by the experience of human nature. Common examples include those involving some intimate family relationship to one of the parties by blood or marriage ... or some such relationship to a person, other than a party, who is involved on one or the other side of the litigation, or is otherwise prejudiced for or against one of the parties. (Internal citations omitted). *State v. J.L.S.*, 259 S.W.3d 39, 44 -45 (Mo. App. 2008).

¹³³ See *Smulls v. State*, 71 S.W.3d 138, 151 (Mo. banc 2002); *State v. Butts*, 938 S.W.2d 924 (Mo. App. 1997); *State v. Kinder*, 942 S.W.2d at 334 (Mo. banc 1996); *State v. Thomas*, 596 S.W.2d 409, 413 (Mo. banc 1980).

¹³⁴ See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. See also EFIS Docket Number 39, *Office of the Public Counsel’s Motion In Limine and Suggestions in Support*, filed August 6, 2008.

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80. There is no evidence in the record that witnesses Shepard or Williams, or their respective employers, demonstrated a predisposition or preference or an inclination that inhibited their impartial judgment, or that a statistical sampling or testing error was created by them by systematically favoring some outcomes over others.

81. Public Counsel based its claim of bias on the assertion that because witness Shepard had consulted the Commission's Staff to obtain information on salaries and cost data for companies comparable to Stoddard County that he was automatically biased. Public Counsel claims that by not consulting with it with regard to this subject matter, that witness Shepard must necessarily be biased and his testimony and report must be excluded.¹³⁵

82. Public Counsel's witness Mr. Robertson attempted to equate accuracy and veracity with bias; however, he stated he had no evidence that the numbers provided by Staff to Bonadio were, in fact, inaccurate or non-verifiable.¹³⁶

83. Public Counsel's witness Mr. Robertson asserted that for witness Shepard to request information from the Commission's Staff rendered him non-neutral because Public Counsel had an opposing view from Staff and because Mr. Shepard accepted the numbers from Staff without independently verifying them. However, Mr. Robertson also testified that Public Counsel should not be held to the same standard and be required to verify the numbers provide by Mr. Owens in his Annual Reports to the Commission – information that he used in his analysis.¹³⁷

84. The information provided to Bonadio from Staff, was public information from prior Commission cases and is available to any person, entity or group that might request such information.¹³⁸

85. There is no evidence in the record that any of the publicly available information utilized by Bonadio was altered in any way.

86. Public Counsel utilized the same information used by Bonadio without offering any additional verification of that information, and utilized

¹³⁵ Transcript pp. 80, 102, 224-226, 229-230, 239-240, 248-250.

¹³⁶ Transcript, pp. 249-251.

¹³⁷ *Id.*

¹³⁸ Transcript, pp. 55-57, 177-179, 209-211, 239-240, 277-278. See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461.

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publicly available data on one additional Commission case for its analysis of operator's salary without providing any verification of that information other than its sources was a Commission case, i.e. publicly available record information.¹³⁹

87. Regarding Bonadio's Report, Mr. Robertson also testified that: (1) there were only a few major categories that he had disagreement with; (2) his analysis and Bonadio's analysis were pretty close on the cost structure of the company; (3) that a limited review, and not a full audit, was appropriate for an interim rate increase evaluation; and (4) that Bonadio's calculations were reasonable or just a few dollars off with regard to 50 or 60 percent of the line items.¹⁴⁰

88. Mr. Robertson further testified that the future rate case to be ordered by the Commission as part of Stoddard County's requested relief would cure any problems (if any are established) with the limited review that Bonadio prepared for the Commission.¹⁴¹

89. There is no evidence in the record to support Public Counsel's claim that by retaining Bonadio and Smith & Company to provide neutral expert analyses of Stoddard County the Commission demonstrated a predisposition or preference or an inclination that inhibited their impartial judgment.

90. While Public Counsel is free to question the accuracy and veracity of the reports and testimony from Bonadio and Smith & Co., there has been no bias demonstrated, and any evidence of bias would require admission of that evidence into the record – bias is not a basis for excluding evidence, but goes to weight and credibility.

D. Stoddard County's Current Operation

91. Stoddard County's wastewater treatment plant ("WWTP") is located just southwest of the City of Dexter, approximately 36 miles east of Poplar Bluff.¹⁴²

92. The history of the ownership and operation of Stoddard County's

¹³⁹ *Id.* Transcript, pp. 240-244, 276. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389.

¹⁴⁰ Transcript pp. 254-260. There were 25 line items listed on Public Counsel's comparative analysis exhibit. Of these 25, Public Counsel and Mr. Shepard were in total agreement on 6 items or approximately 24%. The calculations of these two witnesses differed between \$11 and \$525 on an additional 6 items, or another 24%. On three items, the witnesses differed between \$910 and \$1354 or an additional 12%. These were small variances and confirm Mr. Robert's testimony that the experts were in general or close agreement at least 50-60% of the time.

¹⁴¹ Transcript, pp. 252-253.

¹⁴² Exh. 3, Preliminary Engineering Report, pp. 1-3.

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WWTP is as follows:

a) At the time of its inception in 1979, Stoddard County, and all of its assets, was owned and operated by Mr. Carl Bien.¹⁴³

b) Stoddard County was owned and operated by Mr. Carl Bien until he passed away on April 11, 2000.¹⁴⁴

c) Stoddard County failed to file annual reports with the Commission for calendar years 1996 through 2000. It also failed to pay its Commission assessments for fiscal year 2000, in the amount of \$1991.61, for fiscal year 2001, in the amount of \$1,251.64, and for fiscal year 2002, in the amount of \$1,448.56.¹⁴⁵

d) On September 14, 1999, prior to Mr. Bien's death, Stoddard County's corporate entity was administratively dissolved for its failure to file an annual registration report within 30 days after it was due, and the dissolution has not been rescinded.¹⁴⁶

e) According to records maintained by the Missouri Secretary of State, Stoddard County's registered agent was Carl Bien, and Stoddard County has not notified the Secretary of State of a change in its registered agent since Mr. Bien's death.¹⁴⁷

¹⁴³ EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, Filed March 4, 2008; *In the Matter of the Approval of Stoddard County Sewer Co., Inc., for the Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri*, Report and Order, issued August 31, 1979, effective September 11, 1979; *In the Matter of the Application of Stoddard County Sewer Co., Inc., for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri; This is to Extend Service Area Boundaries Only*, Order Granting Certificate, issued May 7, 1986, effective May 19, 1986; Exh. 3, Preliminary Engineering Report, pp. 1-3; Exh. 5, Unanimous Stipulation of Facts; Exh. 7, *In the Estate of Carl S. Bien, Sr. Deceased*, Assignment and Receipt of the Circuit Court of Stoddard County, Probate Division, Estate No. 35P070000096, and Assignment of Interested in Stoddard County Sewer, Inc. from Ruth Bien to R.D. Sewer Co. L.L.C.; Transcript, pp. 108-113.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* See also EFIS Docket No. 4, *Response to Order Directing Staff to File a Report*, filed April 4, 2008.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

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f) Pursuant to the provisions of Section 351.486 1, Stoddard County's corporate existence continues, but the dissolved corporation may not carry on any business except that necessary to wind up and liquidate its business and affairs pursuant to Section 351.476, and to notify claimants pursuant to Sections 351.478 and 351.482.¹⁴⁸

g) Mr. Bien died without a will or having named a personal representative for the corporation, and consequently, the assets of the corporation were initially given to Ms. Brenda Wilson, the Stoddard County Public Administrator ("Public Administrator") to manage its operation.¹⁴⁹

h) Carl Bien's brother-in-law was the person operating the company under Ms. Wilson's management.¹⁵⁰

i) While managing Stoddard County, the Public Administrator sought a rate increase for the company; however, the Commission dismissed this action because of Stoddard County's dissolved corporate status and the failure of the company to have paid its annual Commission assessments or file its annual reports.¹⁵¹

j) Ultimately, on June 11, 2002, the probate court awarded the assets of the company and 100% of the shares of the company, to Mrs. Ruth Bien, wife of the decedent.¹⁵²

k) Mrs. Bien did not wish to operate Stoddard County.¹⁵³

l) During this time frame, Arlie Smith, a field representative for the Commission, approached Rodger Owens and was asked if he would be interested in taking over the operations of the sewer company.¹⁵⁴

m) Mr. Owens took over running the operations of Stoddard County in January of 2002 and on or about June 7, 2002 formed R. D. Sewer Company, L.L.C. to formally take over the control and operation of Stoddard County.¹⁵⁵

n) Mrs. Bien assigned the entire stock interest in Stoddard County to R. D. Sewer on or about June 11, 2002.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

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o) On August 8, 2002, R. D. Sewer accepted Mrs. Bien's assignment of all her interest in Stoddard County, designated Rodger Owens as the manager of the sewer company, and authorized Mr. Owens to act on behalf of Stoddard County to conduct the day-to-day management of Stoddard Company's facilities and business.

p) Since R. D. Sewer took over Stoddard County's operations, Stoddard County has filed with the Commission all annual reports (that became due after August 8, 2002) and has paid all Commission assessments.¹⁵⁶

q) R. D. Sewer is not willing to rescind the dissolution of Stoddard County's corporate status, and the Joint Applicants know of no other person or entity that is willing to rescind the dissolution of Stoddard County.¹⁵⁷

r) Applicant R. D. Sewer does not have any pending action or final unsatisfied judgment or decision against it from any state or federal agency or court that involves customer service or rates that has occurred within three years prior to the date of the filing of this Joint Application.¹⁵⁸

s) Applicant R. D. Sewer does not have any overdue Commission annual reports or assessment fees.¹⁵⁹

t) No person, group or other entity, has, at any time since Stoddard County's real and personal assets were placed into service, secured from the Commission an order authorizing Stoddard County to sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber any of the assets of the company.¹⁶⁰

93. The history of the construction and permitting of the Stoddard County's WWTP is as follows:

a) On December 22, 1978, the DNR issued a construction permit for Stoddard County. This permit included the installation and construction of 5,300 feet of gravity sewer line, 15 manholes, 12,000 feet of 2 inch pressure sewer line with 33 cleanouts, a duplex pump station with 1,000 feet of 4 inch force main, 20 grinder pump units, and one interim 25,000

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Stoddard county's assets are described in Paragraphs 42 and 43 of the Joint Application – EFIS Docket No. 1.

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gallon per day (gpd) extended aeration WWTP.¹⁶¹

b) On August 31, 1979, in Case No. SA-79-11, the Commission granted Stoddard County a Certificate of Convenience and Necessity ("CCN") to construct, install, own, operate, control, manage, and maintain a sewer system for the public to provide sewer service to Western Heights Subdivision and Ecology Acres Subdivision utilizing the system for which it had received its construction permit.¹⁶²

c) At the time the Commission issued Stoddard County its first CCN, there were 278 lots platted in the two subdivisions, 78 homes had been constructed and it was estimated that a total of 270 homes would ultimately be constructed.¹⁶³

d) On January 2, 1985, Stoddard County submitted to the DNR a preliminary engineering report for extending its sewer service to the Grant Apartment complex, also located near Dexter, Missouri.¹⁶⁴

e) On April 28, 1985, DNR informed Stoddard County that it had the capacity to take on wastewater from the Grant Apartments; a 40 unit apartment complex (currently named Westbridge Apartments) and in June 1985, DNR issued a construction permit for the Grant Apartment extension.¹⁶⁵

f) On February 5, 1986, Stoddard County filed an application with the

¹⁶¹ Exh. 3, Preliminary Engineering Report, pp. 1-3. Stoddard County, however, was not built according to the DNR permit. An example of this fact is the size of the existing force main which is 3 inches in diameter rather than 4 inches. *Id.*

¹⁶² EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008; *In the Matter of the Approval of Stoddard County Sewer Co., Inc., for the Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri*, Report and Order, issued August 31, 1979, effective September 11, 1979; *In the Matter of the Application of Stoddard County Sewer Co., Inc., for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri; This is to Extend Service Area Boundaries Only*, Order Granting Certificate, issued May 7, 1986, effective May 19, 1986; Exh. 3, Preliminary Engineering Report, pp. 1-3; Exh. 5, Unanimous Stipulation of Facts.

¹⁶³ *In the Matter of the Approval of Stoddard County Sewer Co., Inc., for the Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri*, Report and Order, issued August 31, 1979, Effective September 11, 1979.

¹⁶⁴ Exh. 3, Preliminary Engineering Report, pp. 1-3.

¹⁶⁵ *Id.*

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Commission to extend its CCN to enlarge its service area to provide sewer service to the Grant Apartments.¹⁶⁶

g) On May 7, 1986, in Case No. SA-86-115, the Commission granted Stoddard County a Certificate of Convenience and Necessity to expand its service area to provide sewer service to Grant Apartments.¹⁶⁷

h) An inspection conducted by the Commission on January 27, 2005 verified that there are actually 57 units at the Grant Apartment complex, not 40.¹⁶⁸

94. A description of the WWTP, in its current state of operation, maintenance and repair is as follows:

a) Stoddard County's WWTP, in its current configuration, is known as an extended air type system. Stoddard County's original Missouri State Operating Permit was for a design flow of 25,000 gpd. This was mistakenly increased in a subsequent permit issued March 3, 1995 indicating a design flow 75,000 gpd. The inaccurate permit expired on June 15, 1999. The system has not changed and only has a design capacity of 25,000 gpd.¹⁶⁹

b) Wastewater arrives at the treatment plant by means of a gravity sewer line and is put through a pump station that delivers it into the plant's primary aeration basin at an elevation of 407.3 feet above Mean Sea Level ("MSL"). An aeration basin is a secondary (biological) stage of wastewater treatment. The only primary treatment the influent wastewater receives is from the submerged bar screen through which it passes when first entering the treatment plant. The bar screen is composed of 1/2 inch bars spaced 1 inch apart center to center.¹⁷⁰

c) The treatment plant is equipped with two aeration basins, a primary and a secondary. The concrete basins have 1 foot thick walls. The primary aeration basin is 10 feet wide, 25 feet long, and 10 feet deep while the secondary aeration basin is 12

¹⁶⁶ *In the Matter of the Application of Stoddard County Sewer Co., Inc., for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri; This is to Extend Service Area Boundaries Only*, Order Granting Certificate, issued May 7, 1986, effective May 19, 1986.

¹⁶⁷ *Id.*

¹⁶⁸ Exh. 3, Preliminary Engineering Report, pp. 1-3.

¹⁶⁹ Exh. 3, Preliminary Engineering Report, pp. 4-7.

¹⁷⁰ *Id.*

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feet wide, 10 feet long, and 10 feet deep.¹⁷¹

d) The treatment plant has two 4" diameter aeration blowers, but only one is powered by a replacement motor that is being maintained by the plant's current operator. The blower system and controls are housed inside a small building only a few feet from the aeration basins. According to plant records, air filter maintenance occurs every 30 - 60 days.¹⁷²

e) The inside of the building is in disarray and in need of repairs. The walls have been damaged by recent heavy rain and high wind events. Only one of two existing blowers is currently in use and there is no back up blower in case of failure. A major concern for the blower system is the fact that there is air loss occurring. Air that should be getting added to the aeration basin is being unused and released adjacent to the blower building. There is a third inlet that would allow for the installation of an additional blower, but it is not in use.¹⁷³

f) The treatment plant's aeration is delivered from the 4 inch blower pipe into a set of five 1 inch ductile iron pipes that are submerged into the bottom of the primary aeration basin. After being aerated in the primary aeration basin for an amount of time determined by the flow of the wastewater, the wastewater is allowed to transfer to the second aeration basin by means of a 4 inch PVC pipe. Inside the second aeration basin, wastewater is allowed additional contact time and is further aerated by two 1 inch ductile iron pipes which further reduce Biological Oxygen Demand ("BOD"), a DNR effluent parameter.¹⁷⁴

g) Activated sludge is allowed to flow from the bottom of the system's clarifier's into the aeration basins which improves the efficiency of BOD reduction. The second aeration basin features a second inlet into the system with the same submerged bar screen as in the first basin; however this second inlet is not used. A series of pipes allow the wastewater in the second aeration basin to move to the next process in the treatment process. Around the aeration basins there is a wooden fence to prevent

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* According to the plant operator, Mr. Owens, the air release is being performed to regulate aeration in the aeration basin. *Id.*

¹⁷⁴ *Id.*

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accidents.¹⁷⁵

h) The piping in the WWTP is extremely old and worn. The walkway above the basins is severely rusted as is the majority of the piping in and around the system. The walkway could be scraped and painted and the aeration piping system would need to be replaced if the system is renovated.¹⁷⁶

i) The next stage in the treatment process is accomplished with two rectangular clarifiers. Each clarifier is 5' feet wide, 10 feet long, and has a depth of 10 feet. The clarifiers are used in-series in the treatment process so that the detention time of each clarifier, which is based on the wastewater flow, is added to its adjacent clarifier for maximum Total Suspended Solids ("TSS") and BOD reduction. The piping system inside each clarifier allows for the movement of sludge that settles at their bases. From the first clarifier, sludge moves into either the secondary aeration basin or the waste sludge basin depending on the sludge level in the secondary aeration basin. The second clarifier allows sludge to not only travel to the secondary aeration basin but also to the primary aeration basin. Each clarifier is also equipped with a skimming pipe that allows aerated wastewater to be delivered to each clarifier directly from the primary aeration basin. Weirs in both clarifiers skim off the clarified liquid as it moves toward the effluent pipe which sits at an elevation of 406 .0 feet above MSL. The valve controls and metallic weirs that allow treated water to skim off the surface of the clarifiers are in a rusted condition. The clarifiers are in deplorable condition and need to be replaced.¹⁷⁷

j) To accommodate excess sludge build up in the WWTP the plant also employs the use of a waste sludge basin. The rectangular sludge holding tank has an inside length of 12 feet, width of 6 feet, and a depth of 10 feet. With these dimensions the sludge tank has a storage capacity of approximately 5,373 gallons. The sludge holding tank does not include a decanting system and so dewatering of the sludge is impossible. The sludge holding tank has no outlet. According to the WWTP operator, the sludge in the sludge holding tank is periodically pumped out by a contractor that most likely disposes of the

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

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sludge at a landfill. The WWTP has a secondary sludge container at its disposal in case sludge buildup in the holding basin is too great; it is a cylindrical container that can be towed. According to the last issued permit, the system produces 13 .5 dry tons of sludge per year. The sludge holding basin is also in very poor condition; the piping in and out of the basin is severely worn and needs replacement.¹⁷⁸

k) The outfall stream for the Stoddard County WWTP is an unnamed tributary to Cane Creek. The treated effluent leaves the plant through Outfall #001, a 10 inch polyvinyl chloride (PVC) pipe. The exact location of the outfall is the SE 1/4, NW 1/4, Section 32, Township 25 North, and Range 10 East in Stoddard County. Effluent travels from Cane Creek to Dudley Main Ditch and then to the Saint Francis River. The description given to the receiving stream and basin is as follows: Unnamed Tributary to Cane Creek, Otter Slough (St . Francis River Basin). The effluent leaving the WWTP is extremely cloudy and there appears to be sludge build up near the effluent pipe. The effluent pipe is missing a flap valve and there is some trash build up near the mouth of the pipe.¹⁷⁹

l) The collection system consists of approximately 5,300 feet of gravity sewer line, 15 manholes, 12,000 feet of 2 inch pressure sewer line with 33 cleanouts, a duplex pump station with 1,000 feet of 3 inch PVC force main, and 20 grinder pump units. The system also includes 8 inch gravity sewer lines that lead to the treatment plant. Manholes and manhole access locations appear to be in good general condition, although some of the manholes have been found to be in areas that flood quite easily during rainfall. DNR inspectors have suggested that manholes in areas that flood be sealed shut or bolted down to prevent wash outs during rain events. Also of great concern is the fact that many of the clean outs throughout the collection system that have been damaged by juveniles in the area. As stated by the treatment system's operator there isn't any money to make the necessary clean out repairs.¹⁸⁰

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* The majority of the system was installed around 1980. DNR inspections indicate that the general condition of the collection system is good. The fact that PVC piping was

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m) The WWTP has two lift stations. The first is a duplex 80 gallons per minute (gpm) pumping station operating at 104 feet of total dynamic head (TDH) at the southern most location of the system near the intersection of Two-Mile Road and Henry Street. The second lift station is located at the Westbridge Apartments and has a history of failing. The lift station was designed to accommodate two pumps so that if one were to fail, the other would operate until repairs could be made on the primary pump. The lift station at the Westbridge Apartments has recently had repairs made as part of the efforts to correct the bypass problem that produced many local complaints. Both lift stations for this system have 4 foot diameter manholes. The pumps are 2 - 5 horsepower Hydromatic pumps. The wet well capacity of each lift station is approximately 1,366 gallons. The lift station controls are equipped with their own warning devices and cut-off switches in the event that a failure should occur. Stoddard County has no spare pumps for the two lift stations in the system. It is extremely important that the southernmost wet well have one spare pump on standby in case it should break down. The lift station at Westbridge Apartments should have two working pumps but only has one at this time. A new second pump should be installed and one more should be placed on standby should a failure occur at the lift station. The overall condition of the lift stations is good. Despite the fact that the overall condition of each lift station is good, they have problems.¹⁸¹

n) Flow Capacity - As evidenced in the correspondence among the several parties that have an interest in the SCSC

used instead of vitrified clay pipe (VCP) means that the collection system may still have many years of serviceability ahead of it. *Id.*

¹⁸¹ *Id.* The southernmost lift station appears to have a leak where wastewater is somehow leaking into a nearby grassy area. The lift station is extremely close to a nearby agricultural operation where at the time of our inspection the crops had been freshly planted. The puddle of wastewater that seemed to have leaked from the lift station was approximately ten to fifteen feet away from the crop area; so should a large scale break in the line occur there could be a large mess for the land owner to have to worry about. This could lead to the owner of the wastewater collection system having to compensate the land owner for any damages and expenses related to a cleanup. The actual danger of such an incident is relatively low since the surrounding terrain and topography is accommodating for downhill flow in a north to south orientation which would lead any leakage away from the crops and allow it to enter a Cane Creek tributary. As part of any remediation efforts for the collection system and lift stations there should be a thorough inspection of both lift stations to ensure there is no danger of leaks or breaks in their piping systems. *Id.*

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WWTP, there has been a bit of confusion about what the actual flow capacity is for the plant. As previously stated, the design flow capacity of the plant is 25,000 gpd and has been since 1978. The plant remains very much in its original configuration. There is no evidence of any upgrades and adjustments that would have raised the maximum flow capacity of the plant. In 1985, the treatment plant was deemed by DNR to be capable of treating wastewater from a 40-unit apartment complex. This decision was due to a careful review of the effluent BOD and TSS readings from the plant which indicated at the time that the treatment plant was easily meeting its prescribed effluent limitations and would have the capacity to take on more BOD reduction responsibility. The construction of the apartment complex produced a total of 57 apartments instead of 40. According to Stoddard County's last issued permit their design population equivalent was equal to 750 people. According to the Rules of Department of Natural Resources Division 20 – Clean Water Commission Chapter 8 - Design Guides CSR 20-8 .020 Design of Small Sewage Works the most conservative estimate for the wastewater flow production per person connected to a WWTP is 100 gallons per day. This translates to the fact that for the 750 people considered to be connected to the treatment plant the total design flow would be 750 times 100 which is equal to 75,000 gallons per day. There are 109 residential homes and 67 apartments being served by the existing wastewater collection system and extended aeration treatment plant. When accounting for the design guide value of 3 .7 people per residence or apartment the current population served is closer to 652 people. Using the previously mentioned calculation method for determining design flow, the WWTP must be able to accommodate the existing flow of 65,200 gallons per day in wastewater influent. The current treatment system is only capable of adequately removing BOD from a peak flow of 25,000 gallons per day but instead is consistently faced with flows reaching a maximum of 65,200 gallons per day. The estimated BOD loading from the existing population, utilizing the DNR design guide value of 0.17 pounds of BOD per person is 110.84 pounds of BOD per day. The original BOD loading value, based

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on the original design population of 250, was 42.50 pounds per day. This problem requires immediate attention.¹⁸²

o) Infiltration and Inflow -- Another problem currently faced by the Stoddard County WWTP is infiltration and inflow which is also referred to as "I & I".¹⁸³ There are no flow meters installed at the treatment plant, but given the estimated population connected to the WWTP of 652, the design wastewater flow should be in the neighborhood of 65,200 gpd. Peak flows of this system can range up to 12 times higher than the design flow due to inflow. This would make the goal of BOD reduction virtually impossible for the system to accomplish. The circumstances surrounding the WWTP, i.e. topography, system age, and poor maintenance, suggests that the collection system has some infiltration problems but the majority of the extraneous flow would be from inflow. This is a good situation for the collection system in that inflow is much easier to locate and correct than infiltration.¹⁸⁴

E. Purported Encumbrances on Stoddard County

95. All of the parties to this action are in agreement that various documents exist that purport to convey security interests in Stoddard County's assets to various entities. The said documents include the following:¹⁸⁵

¹⁸² *Id.*

¹⁸³ *Id.* Infiltration is groundwater that enters the system through defects in the collection system such as bad pipe joints, cracked or otherwise damaged pipes, and leaking manholes. Inflow is rainwater that enters the system through illegal connections such as roof drains, area drains, and abandoned lots. Infiltration typically lasts for prolonged periods when groundwater levels are high. Inflow is usually instantaneous, occurring at the same time as major rain events. *Id.*

¹⁸⁴ *Id.* Stoddard County should begin a program to locate and correct sources of inflow. One of the best methods is smoke testing where non toxic smoke is forced into the sewer lines between adjacent manholes. The area between the manholes is observed during the test. Smoke emanating from gutters, vacant lots, or other locations are marked and recorded. After accumulating data on the entire system, Stoddard County will need to follow up by making the necessary repairs. Homeowners will need to be forced to disconnect their gutters from the system or to plug drains in their yards. Open pipes on vacant lots will need to be plugged. *Id.*

¹⁸⁵ Exh. 5, Unanimous Stipulation of Facts; EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008; EFIS Docket No. 15, *Staff's Supplementary Information Regarding Security Interests in Stoddard County Sewer Company Assets*, filed May 2, 2008; EFIS Docket No. 17, *Staff's Notice*

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a) Deed of Trust and Security Agreement by and between Stoddard County Sewer Co., Inc. and Clinton Enterprises,¹⁸⁶ dated May 24, 1996 and recorded on June 3, 1996, in Book 289 at Page 451 of the land records of Stoddard County, Missouri (this agreement included a promissory note for \$100,000;¹⁸⁷ Corporation Guaranty Agreement by and between Clinton Enterprises and Carl Bien and Ruth Bien dated May 24, 1996; Security Agreement by and between Bien Co., Inc. and Clinton Enterprises dated May 24, 1996; Uniform Commercial Code - Financing Statement from Bien Co., Inc. to Clinton Enterprises; Modification and Extension Agreement by and between Carl Bien and Ruth Bien and Clinton Enterprises, dated June 3, 1997 (extending the \$100,000, May 24, 1996 promissory note, plus \$20,000 in accumulated interest, and increasing the secured interest by an additional \$15,000 loan to the Bien's for a total note of \$135,000)¹⁸⁸; Note dated June 3, 1997 in the amount of \$30,000.00 from Carl Bien and Ruth Bien to Clinton Enterprises; Trust Deed by and between Carl Bien and Ruth Bien and Clinton Enterprises dated September 8, 1997, recorded September 17, 1997 in Book 298 at Page 898 of the land records of Stoddard County, Missouri.

b) Deed of Trust by and between Stoddard County Sewer Co., Inc. and Citizens Bank of Dexter, in the amount of \$550,000, dated April 20, 1980 and recorded April 30, 1980 in Book 209 at Page 635 of the land records of Stoddard County, Missouri; and note subsequently assigned to the Small Business

Regarding Additional Security Interest in Stoddard County Sewer Company Assets, filed May 23, 2008.

¹⁸⁶ Clinton Enterprises' last known address is P.O. Box 766, Sikeston, Missouri 63801. Notice was served at this address, but Clinton Enterprises did not intervene in this action. See EFIS Docket No. 2, *Order Directing Notice, Setting Intervention Deadline and Directing the Department of Natural Resources to File a Compliance Report*, issued March 5, 2008.

¹⁸⁷ The parties appear to have listed a typographical error with the date and amounts on the promissory note executed with Clinton Enterprises. The date of May 24, 1997, listed by the parties for the first \$100,000 loan was actually the date scheduled for payment. Payment was apparently not completed for the loan made on May 24, 1996 requiring the execution of the modification agreement on May 24, 1997. The principal on the first promissory note, being paid with an interest rate of 20% per annum, had increased from \$100,000 to \$120,000 at the time the modification agreement was executed.

¹⁸⁸ The Modification Agreement notes that as of May 24, 1997, the unpaid balance on the May 24, 1996 promissory note has increased to \$120,000. Consequently, the additional \$15,000 increased the total to \$135,000.

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Administration on December 14, 1983, and recorded on December 22, 1983, in Book 71 at Page 39 of the land records of Stoddard County, Missouri.

c) Second Deed of Trust executed by Stoddard County Sewer Co., Inc. in favor of Ed Maslansang, trustee for Michael Brennan, to secure payment of a promissory note, in the amount of \$40,000, from Carl Bien to Michael Brennan. The Second Deed of Trust was executed on May 1, 2000, and recorded in the office of the Recorder of Deeds for Stoddard County, Missouri, on May 3, 2000, in Book 324, at Page 136.

96. There is no record evidence that Carl or Ruth Bien ever sought Commission approval of the security interests that were executed, as listed in Finding of Fact Number 95, as required by Section 393.190 prior to their execution.

97. There is no record evidence that Carl or Ruth Bien ever sought Commission approval of the security interests that were executed, as listed in Finding of Fact Number 95, after their execution.

98. There is no record evidence that Carl or Ruth Bien ever sought Commission approval of any security interests without having first secured an order from the Commission authorizing the sale, assignment, lease, transfer, mortgage, or execution of any other instrument or mechanism that would encumber the whole or any part of Stoddard County, and/or its assets, in any manner, as required by Section 393.190 prior to their execution.

99. There is no record evidence that Rodger Owens, the current operator and manger of Stoddard County, executed any type of security interest that would encumber the whole or any part of Stoddard County, and/or its assets, in any manner, that would have necessitated Commission approval prior to their execution as required by Section 393.190.¹⁸⁹

100. The loan provided to Stoddard County by Maco, previously identified in this order, is an unsecured loan.¹⁹⁰

¹⁸⁹ The Commission notes that Stoddard County's 2007 Annual Report lists outstanding loans/debts to Maco Construction, Ray Clinton, the Holden Law Firm, Rodger and LaDawn Owens. It also lists a labor lien and a bank lien. There is no evidence; however, that any of Stoddard County's assets were used to secure these debts. See *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. 10.

¹⁹⁰ Transcript, Volume 2, pp. 15-20; Transcript, Volume 3, pp. 132-135; Exh. 3, Preliminary Engineering Report, p. 3.

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101. There is no record evidence that the Commission ever approved or authorized any security interests that would encumber the whole or any part of Stoddard County, and/or its assets, in any manner.

F. Stoddard County's Cost Structure

1. Analyses and Methodology

102. The methodology utilized when performing an accounting analysis of a company such as Stoddard County is part art and part science.¹⁹¹

103. All of the parties agree, and all of the accounting analyses presented in this case confirm, that Stoddard County is operating with a revenue deficit.¹⁹²

104. All of the parties agree that it is appropriate to approve the transfer of assets from Stoddard County to R. D. Sewer and to approve an interim rate increase for Stoddard County subject to refund.¹⁹³

105. The parties disagree on Stoddard County's current cost structure and the specific amount of the interim rate increase Stoddard County should receive prior to completing a formal small company rate increase proceeding pursuant to Commission Rule 4 CSR 240-3.050.¹⁹⁴

¹⁹¹ Transcript, pp. 81 (Shepard), 254-255 (Robertson). Indeed, as the Missouri Court of Appeals has noted with regard to determining rates, which is necessarily dependent upon determining a company's cost structure: 'The cases also recognize that the fixing of rates is a matter largely of prophecy and because of this commissions in carrying out their functions necessarily deal in what are called 'zones of reasonableness' the result of which is that they have some latitude in exercising this most difficult function. . . ." *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 570 -571 (Mo. App. 1976).

¹⁹² Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 49 (Bonadio-Shepard); 129 (Owens); 173 (Staff-Merciel) 199-202 (Staff-Rackers); 212, 232, 260, 266 (Robertson).

¹⁹³ Transcript, pp. 125 (Owens), 226-228, 252 (Robertson), (253-254, 280-282 contrary position of Robertson on refund); EFIS Docket No. 33, Statement of Position on Issues of Stoddard County Sewer Company, Inc. and R. D. Sewer Co. L.L.C., Private Joint Applicants, filed August 4, 2008; EFIS Docket No. 34, Staff's Statement of Positions on Issues, filed August 4, 2008; EFIS Docket No. 35, Office of the Public counsel's Position Statement, filed August 4, 2008.

¹⁹⁴ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.; Exh. 3, Preliminary Engineering Report, Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For*

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106. The record evidence includes four separate accountings or statements of position regarding Stoddard County's revenue requirement, each utilizing either a different methodology or a different set of variables, and each reaching a different result. The four accountings are summarized in the table below:¹⁹⁵

Recommendations	Stoddard County	Public Counsel	Bonadio	Staff's 2002 Audit
Description				
Postage				
Post office Box	\$0	\$0	\$0	\$55
Payroll/Services				
Billing Expense	\$9,600	\$0	\$4,160	\$1,200
Operator	\$24,000	\$8,749	\$13,800	\$15,000
Expense	\$750	\$750	\$750	\$400
Mowing				
Miscellaneous				
Misc.	\$100	\$100	\$100	\$0
Office Supplies	\$3,508	\$1,340	\$3,100	\$180
Effluent Testing	\$1,252	\$1,241	\$1,252	\$1,703
Repair &	\$0	\$1,012	\$2,400	\$743
Maintenance	\$230	\$230	\$230	\$163
Real Estate	\$5,400	\$0	\$5,400	\$4,150
Taxes	\$4,200	\$1,050	\$1,050	0
Depreciation				
Expense				
Rent				
Assessments/Permits				
Annual Registration	\$50	\$50	\$50	\$50
DNR Ann Op Permit	\$3,000	\$2,500	\$3,000	\$3,000
PSC Assessment	\$2,219	\$2,219	\$2,219	\$1,449
Utility Expense				
Utilities	\$8,500	\$8,219	\$8,500	\$9,484
Telecommunications	\$3,060	\$309	\$834	\$860

the Calendar Year of January 1- December 31, 2007; Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation;

¹⁹⁵ *Id.* The table was constructed primarily utilizing Exh. 13 offered by Public Counsel that summarized the proposals and contrasted them individually with their own.

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Other Expense							
Sludge Hauling		\$3,800		\$446		\$1,800	
Uncollectibles		\$500		\$330		\$500	
Insurance		\$1,499		\$591		\$1,501	
Legal & Professional		\$3,600		\$584		\$1,000	
Total Expenses		\$75,268		\$29,720		\$51,646	
Return on Investment		\$7,021		\$0		\$7,021	
Total Cost of Service		\$82,289		\$29,720		\$58,667	
Total Revenues		\$21,970		\$21,970		\$21,970	
Net Revenue Deficit		\$60,319		\$7,750		\$36,697	

107. The line items in the Table included with Finding of Fact Number 106 that represent the Stoddard County's position are a compilation made by Public Counsel utilizing, in part, the numbers the Stoddard County provided to Bonadio. Stoddard County has not formally sought to recover the net revenue deficit derived from those numbers in this action.¹⁹⁶

108. Bonadio, who performed a limited review, utilized the accrual basis of accounting to determine the revenue requirement for Stoddard County.¹⁹⁷

109. Bonadio's Report explained the methodology used as follows:

On June 19 and 20, 2008, Bonadio interviewed LaDawn and Rodger Owens, the current operators of Stoddard County. Bonadio reviewed the information provided relating to invoices and receipts for Stoddard County. Bonadio noted the Owens' also operate three other water districts. All operations are run out of one office and overhead costs are shared among all four

¹⁹⁶ Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript p. 208.

¹⁹⁷ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

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operations resulting in efficiencies.

Currently, neither LaDawn, nor Rodger, are drawing any regular salary or dollars from their operation of Stoddard County. Each month, invoices are paid from the businesses that have enough cash to make the payment. Amounts are allocated between the Water and Sewer systems owned/operated by the Owens'. If any excess cash exists, then Rodger or LaDawn will draw a payment for services provided. At times, either Rodney Owens (Roger's son) or Natalie Spitzer (LaDawn's daughter) will provide services to the system and may be paid for those services. The services provided include, but are not limited to, maintenance, lawn mowing, monitoring phone calls, [and] plant observations.

As a result, based on our analysis, many of the actual costs reported for 2007 may not necessarily be a true representation of costs and expenses of the system. Additionally, previously reported amounts have been prepared using the cash basis of accounting, which recognizes revenues when cash is received and expenses when cash is disbursed, regardless of when the revenue is earned, or expenses are incurred. The information provided by Bonadio's analysis has been prepared utilizing the accrual basis of accounting. **The accrual basis of accounting recognizes revenues when the service is provided and expenses when the costs are incurred, regardless of when the cash is received or disbursed, and therefore presents a truer picture of actual operations.** (Emphasis added).

110. Bonadio rounded up its line item allocations subjectively, and rounding up is a common accounting practice because these types of calculations are not an exact science.¹⁹⁸

111. While Bonadio has extensive accounting experience with water and sewer utilities, it has limited experience with Missouri regulatory ratemaking procedures. Consequently, the Commission will give less weight to two of the line items allocations Bonadio recommended for Stoddard County's cost structure, i.e. depreciation expense and return on investment.¹⁹⁹

112. Based upon its extensive accounting experience, the remainder of the line item allocations recommended by Bonadio are

¹⁹⁸ Transcript, p. 81.

¹⁹⁹ See Finding of Fact Number 18 Transcript pp. 34-35.

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credible and substantial.

113. The accounting analysis provided by Staff is taken directly from Staff's 2002 audit of Stoddard County in the rate case that was filed, but ultimately dismissed. Staff performed a full audit as opposed to a limited review.²⁰⁰

114. The day-to-day expenses of Stoddard County, and the total of those expenses currently, i.e. 2008, are not less than what is reflected in the 2002 audit.²⁰¹

115. Public Counsel also performed a limited review, primarily relying on the company's 2007 Annual Report and its knowledge of small rate case procedures.²⁰²

116. Annual Reports filed with the Commission are presumed to be true and accurate.²⁰³

117. Public Counsel did not independently verify any of Stoddard County's Annual Reports.²⁰⁴

118. Public Counsel did not rely on Stoddard County's 2007 Annual Report for its analysis and recommendations on the line items of mowing, property tax, corporate registration, rent and miscellaneous expenses; its witness stating that these costs were immaterial.²⁰⁵

119. Public Counsel made Consumer Price Index ("CPI") adjustments to the company's 2007 Annual Report line items of sludge hauling, repairs, utilities, effluent testing, insurance and legal and professional fees to derive its recommendations for these particular line items.²⁰⁶

120. Public Counsel relied upon an Internet review of market information to determine what it believes should be the proper operator's

²⁰⁰ Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Transcript, pp. 194-202.

²⁰¹ Transcript, p. 188.

²⁰² Transcript, p. 211.

²⁰³ Transcript, pp. 213, 217-218, 251, 257. Mr. Robertson accurately referred to Exhibits 8 (Attachment C – Balance Sheet and Income Statement – 2006) and Exhibit 9 (Balance Sheets – 2007) interchangeably with Stoddard County's Annual Reports, and these exhibits are, in fact, comprised of portions of those reports. Transcript, p. 217.

²⁰⁴ Transcript, pp. 250-251. Neither Bonadio or Public Counsel independently verified the public records on which they based their opinions. While Mr. Robertson, testifying for Public Counsel, criticized Bonadio for not independently verifying public records, he inexplicably indicated that Public Counsel should not be held to the same standard. *Id.*

²⁰⁵ Transcript, pp. 244-245; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Findings of Fact Sections for those particular line items. See Generally Transcripts, pp. 206-282.

²⁰⁶ Transcript, pp. 242-243.

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expense.²⁰⁷

121. It is unclear from the record what information Public Counsel relied on, or how it performed its analysis, when determining its recommendations for Stoddard County's cost structure for the following line items: billing expenses, office supplies, telecommunications, and uncollectible expenses.²⁰⁸

122. There was little difference between Public Counsel's cost structure analysis and Bonadio's cost structure analysis, with the exception of a few categories.²⁰⁹

123. The differences between Public Counsel's and Bonadio's cost structure analysis are really small and maybe even immaterial.²¹⁰

124. The biggest differences between Public Counsel's analysis and Bonadio's analysis are the plant, the depreciation and most of the labor and repairs costs.²¹¹

125. The accounting services currently provided to Stoddard County are inadequate and have resulted in inaccurate reporting.²¹²

126. Stoddard County's Annual Reports for 2006 and 2007 do not capture all of the labor and expense Mr. and Mrs. Owens have contributed to, or invested in, the WWTP. Consequently, the net losses reported in those reports are lower than the actual losses Stoddard County has experienced.²¹³

127. For purposes of determining the proper cost structure for Stoddard County, methodology employing an extrapolation of expenses (i.e. Consumer Price Index adjustments) from potentially inaccurate annual reports, and methodology employing subjective rounding of actual cost figures of expenses, magnify any inaccuracies inherent in the respective methodologies.

²⁰⁷ Transcript, pp. 268-269.

²⁰⁸ Transcript, pp. 244-245; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Findings of Fact Sections for those particular line items. See Generally Transcripts, pp. 206-282.

²⁰⁹ Transcript, p. 211, 243, 259-260.

²¹⁰ Transcript, p. 211.

²¹¹ Transcript, pp. 211-212.

²¹² Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, p. 4.

²¹³ Transcript, pp. 159-160. Mr. Owens, testifying for Stoddard County, stated that the company's 2007 Annual Report is accurate to the best of his knowledge with the exception in that they do not accurately reflect the labor contributed to the WWTP by Mr. and Mrs. Owens. Transcript, p. 122, 160. Mr. Owens was responding to questions about Exhibits 9, which includes part of the complete 2007 Annual Report.

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128. In this instance, actual cost figures, without rounding, from Stoddard County's invoices, as determined by Bonadio, are more accurate than the expenses reported in the company's 2007 Annual Report, or expenses extrapolated from that report.

129. Actual cost figures, without rounding, from Stoddard County's invoices, as determined by Bonadio, provide the most accurate accounting of the company's expenses for purposes of determining Stoddard County's cost structure.

2. Line Item Allocations for Stoddard County's Cost Structure

a. Postage/Post Office Box

130. Only Staff's 2002 audit reflects the existence of a post office box for Stoddard County and an expense associated with it.²¹⁴

131. There was no testimony or other documentation from the parties that would confirm Stoddard County was currently incurring any expense associated with having a post office box.

b. Mowing, Miscellaneous, Real Estate Taxes, Annual Registration, PSC Assessment

132. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, Stoddard County's annual mowing expense should be recognized and accepted as being \$750.²¹⁵

133. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, Stoddard County's annual miscellaneous expenses should be recognized and accepted as being \$100.²¹⁶

134. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, annual real estate taxes expenses for Stoddard County are \$230.²¹⁷

²¹⁴ Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²¹⁵ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 60-61, 243-244.

²¹⁶ *Id.*

²¹⁷ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

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135. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, the annual corporate registration fee for Stoddard County is \$50.²¹⁸

136. Stoddard County, R.D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, the annual Commission assessment expenses for Stoddard County are \$2,219.²¹⁹

137. While serving as a benchmark for comparison, Staff's allocations for the line items of mowing, miscellaneous, real estate taxes, annual registration, and the Commission assessment included in its 2002 audit are now outdated and can no longer be considered to be accurate.²²⁰

138. There is no controverting evidence in the record to challenge the accounting of the line item expense allocations listed in Findings of Fact Numbers 132-137, above.

139. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure: (1) annual mowing expense is \$750; (2) annual miscellaneous expenses are \$100; (3) annual real estate taxes expenses are \$230; (4) the annual corporate registration fee is \$50; and (5) the annual Missouri Public Service Commission Assessment expenses are \$2219.

c. Billing Expense

140. Stoddard County's expenses for billing for the calendar year of 2007 are listed as being \$233.86 in the Annual Report it filed with

Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 74-75, 82, 244.

²¹⁸ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 76, 244. The corporate registration fee has apparently not changed since Staff performed its 2002 audit – see Exh. 12, Revenue Requirement Calculation and Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²¹⁹ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 74-75, 82, 244.

²²⁰ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Transcript, p. 245.

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the Commission.²²¹

141. Stoddard County collect bills monthly, quarterly, semi-annually and annually, although most bills are collected on a monthly basis. Direct monthly billing yields more consistent payments for Stoddard County, but the current company tariffs require the company to use annual payment books. As part of its request for relief, Stoddard County/R. D. Sewer would like to modify its tariffs to implement a monthly billing system and would like to have a provision added to the tariff allowing for late-payment fees.²²²

142. Some of Stoddard County's customers have quit paying their bills and are waiting to see what rates will result from this proceeding before resuming payment.²²³

143. As previously noted, Stoddard County provides service to 172 customers, 115 single family residences and 57 residential apartments.²²⁴

144. The apartment complex, managed by Maco, pays the sewer bills for 51 apartment residents (customers of Stoddard County) and passes the costs of the sewer service on to those residents in their monthly bills. Consequently, if Stoddard County billed all its customers monthly it would be required to mail at least 122 monthly bills (121 individual customers and one bill to Maco to cover 51 customers) or 1462 bills annually.²²⁵

145. Stoddard County and R. D. Sewer provided Bonadio

²²¹ Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1. Transcript pp. 122-123.

²²² Transcript, pp. 131-132, 141-142. See also EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008.

²²³ Transcript, pp. 129-130.

²²⁴ See Finding of Fact Number 4; Transcript, p. 118; EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, Filed March 4, 2008; EFIS Docket No. 4; *Response to Order Directing Staff to File a Report*, filed April 4, 2008; Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission, filed by Bonadio & Co., L.L.P. on July 9, 2008, EFIS Docket No. 25, formally received into evidence on August 13, 2008. Exh. 3, Preliminary Engineering Report, Smith & Co. Engineers.

²²⁵ Transcript, Volume 2, p. 19.

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with a proposal to increase the expense for monthly billing to \$9,600.²²⁶

146. Bonadio recommended that billing expenses for the Stoddard County's cost structure should be \$4,160. Bonadio's analysis utilized the \$1.55 charge per bill/per customer/per month from Staff's calculations from the 2002 rate case and rounded that figure up to \$2.00, i.e. a total of \$4,128, based upon one monthly bill for each of the 172 customers (i.e. 2064 customer bills annually).²²⁷

147. For verification, Bonadio estimated ten hours per week or 520 hours per year would be required for billing and multiplied that by an hourly rate of \$8.00 to get another estimate of \$4,160.²²⁸

148. Bonadio's report more fully explains its recommendation for \$4,160 in billing expenses as follows:²²⁹

R. D. Sewer [Stoddard County] reported billing expenses for 2007 of \$234. An adjustment was proposed [by the company] to increase this expense to a level of \$9,600, based on the estimated expense of \$800 per month for billing clerk and collection expense. This is based on 100 hours/month at \$8 per hour. Based on the current amount of time spent on these activities, Bonadio is of the opinion that these services could be performed in substantially fewer than 1,200 hours per year. The time required to service 172 customers can be reasonably expected to be 40 hours/month or 480 hours/year. At \$8/hour, the expense is estimated at \$4,160. Accordingly, Bonadio recommends an increase of \$3,926 be allowed for rate-making purposes.

149. Bonadio used the \$8.00 per hour figure based upon its knowledge of what rates are charged for billing services, on the size of the WWTP and what it felt would be required to perform the billing and associated bookkeeping.²³⁰

150. The cost figure of \$1.55 per bill/per customer/per month

²²⁶ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission.

²²⁷ Exh. 11, Audit Workpapers; Transcript, pp. 61-63. Note: the transcript references the year 2000, however, this is in error since the rate case was filed in 2002. The Commission must assume that Mr. Shepard's first calculation was based upon the issuance of 172 monthly bills or 2064 annual bills at the rate of \$2.00 per bill resulting in an annual expense of \$4128.

²²⁸ Transcript, pp. 61-63.

²²⁹ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

²³⁰ Transcript, pp. 62-63.

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is a reasonable amount for billing expense.²³¹

151. Staff's work papers from the 2002 audit list a total amount of \$3200 for "Contracted-Billing Expense;" however, Staff listed \$1,200 for this expense in Exhibit 12, where it compares the audit to the company's and Bonadio's proposals.²³²

152. Staff shifted \$2,000 of the \$3,200 Contracted Billing Expense to operator expense. Presumably, the \$2,000 quantified shift represents the time/personnel requirement for billing that was rolled into operator expense.²³³

153. Staff's work papers from 2002 reflect that the number of total bills would be 2064 annually, relying on one bill being generated for every customer.²³⁴

154. Public Counsel, without quantifying a value or providing supporting evidence, recommended billing expenses be considered part of operator's expense and that \$0 be included in the company's cost structure for this line item expense.²³⁵

155. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure billing expense shall remain a separate line item and is \$1,891.

d. Operator's Expense

156. Stoddard County's mechanical system and its size are not easily comparable to other similar sized regulated utilities operating in southeast Missouri for purposes of comparing operator salary costs.²³⁶

157. Stoddard County is a very mechanical system requiring more labor and intensive personnel to keep it operating.²³⁷

158. Given the current condition of the WWTP, Stoddard County requires more labor and more operator time to keep it running

²³¹ Transcript, pp. 180-181.

²³² Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²³³ *Id.* Staff's calculations indicate that it initially determined that \$13,000 was an appropriate salary for a licensed operator of the WWTP; however, its summary table indicates that the amount for billing was decreased from \$3,200 to \$1,200 and operator expense was increased from \$13,000 to \$15,000. *Id.*

²³⁴ Exh. 10, Rate Design Workpapers.

²³⁵ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, p. 209.

²³⁶ Transcript, p. 54.

²³⁷ Transcript, pp. 56-57.

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than other similar systems.²³⁸

159. Stoddard County's operation requires more work and more time than operating a water company.²³⁹ Operating a water system requires between 1.5 and 2 hours per week, while operating Stoddard County's sewer system requires between 14 and 21 hours per week.²⁴⁰

160. Mr. Owens works at least two to three hours each day, seven days a week, on average, to operate and maintain Stoddard County's WWTP.²⁴¹

161. Mr. Owens is "on-call" to (and frequently does) make repairs to Stoddard County's WWTP twenty-four hours a day, seven days a week.²⁴²

162. Mr. Owens barter's his time and labor with different skilled laborers in order to obtain their labor in exchange to assist with maintaining the WWTP.²⁴³

163. Mr. Owens has been operating Stoddard County "pretty well without pay" since he took over operating the system.²⁴⁴

164. Based upon the company's Annual Reports, Stoddard County's operator's expense for the calendar year of 2006 was \$225, and for the calendar year of 2007 was \$1162.69.²⁴⁵

165. Given that Mr. Owens expends no less than 728 to 1092

²³⁸ Transcript, pp. 185-186.

²³⁹ Transcript, p. 117-118. The water companies Mr. Owens operates are Oak Briar Estates, Lakeland Heights Water Company and Whispering Hills Water Company. Transcript, pp. 154, 176. Mr. Robertson, testifying for Public Counsel, stated that he believed water testing requirements were more complicated or conducted with greater frequency that for sewer companies, and believed that any comparison of Stoddard County to combined water and sewer companies was unfair. Transcript, p. 210. While any given water and or sewer systems' testing requirements may factor into the time required to operate the system, the individual testing requirements does not indicate or correlate to the total amount of labor required for testing or for operation of that given the system.

²⁴⁰ *Id.*

²⁴¹ Transcript, pp 117-118.

²⁴² Transcript, p. 118.

²⁴³ Transcript, pp. 136-137.

²⁴⁴ Transcript, p. 124. Mr. Owens testified that if there is a little money left over from the company's revenues that he or his wife may be able to take that small amount to pay for gas or other items. Transcript, pp. 139-140.

²⁴⁵ Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1. Transcript pp. 139-140.

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hours annually to operate Stoddard County, Mr. Owens earned between 20 cents per hour and \$1.60 per hour operating Stoddard County for the years of 2006-2007.

166. Stoddard County and R.D. Sewer provided Bonadio with a proposal to increase the operator's expense to \$24,000.²⁴⁶

167. Bonadio, recommended the operator's fee be set at \$13,800.²⁴⁷ Bonadio's report explains:

The primary purpose of the operator fee is to compensate the management for duties performed for the utility. Bonadio finds that the current operators of Stoddard County also operate 3 other water and sewer districts. If the system is upgraded as necessary, only a limited amount of time would be required by the owner/manager to take care of breakdowns, leaks and other operations of R.D. Sewer as it is a relatively small utility. Accordingly, Bonadio finds that \$13,800 is a reasonable fee for the owner/manager of this utility and has increased 2007 expense by \$12,172 to a level of \$13,800. To the extent necessary capital improvements are not provided for, or completed, these operator fees may be insufficient to cover the costs.²⁴⁸

168. When determining its recommendation for operator's expense for inclusion in Stoddard County's cost structure, Bonadio compared Stoddard County to four other companies operating similar systems. Those companies were, S. K. & M. Water and Sewer Company; Mill Creek Sewers, Inc.; LW Sewer Corporation; and Foxfire Utility Company.²⁴⁹ These companies are similar to Stoddard County in

²⁴⁶ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁴⁷ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Transcript, pp. 47,

²⁴⁸ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Transcript, pp. 47-48. Mr. Shepard testified that if all necessary improvements and repairs were made to the WWTP, that he estimated it would still take a few days per week to operate the system. Transcript, p. 48.

²⁴⁹ Transcript, pp. 55-57, 177-180, 209-211, 239-244, 277-278. See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate*

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that they have mechanical treatment plants and approximately the same number of customers.²⁵⁰ These companies have completed rate cases with the Commission within the past ten years.²⁵¹ Bonadio did not independently verify the public information it obtained from the Commission's staff on these rate cases.²⁵²

169. Bonadio examined the company information from the recent rate cases, identified in Finding of Fact Number 168, developed a range based upon the average cost per customer, and accepted the higher end of that range for its recommendation for an operator expense of \$13,800.²⁵³

170. Given the condition of Stoddard County's WWTP and the extensive hours required to operate it, the Commission finds Bonadio's methodology and results to be reasonable.

171. Staff's 2002 audit recommended an operator expense of \$15,000. Staff's Workpapers reveal that this recommendation is comprised of the combination of \$13,000 for a contracted operator plus a \$2,000 labor/personnel expense for contracted billing services.²⁵⁴ Staff's audit serves to verify Bonadio's methodology and results.

172. Public Counsel based its recommendation for operator expense by comparing Stoddard County to the same four companies Bonadio used for comparison. Public counsel also considered one other company for comparison – Roy-L Utilities.²⁵⁵

Increase Request of Foxfire Utility Company, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389. This information was provided to Bonadio by Mr. Merciel from the Commission's staff. It is publicly available information. Transcript, p. 179. The rate cases had been filed and completed within the past ten years. *Id.* Mr. Merciel testified that he believed he provided Mr. Shepard with information about five companies, but could not remember the fifth company. Transcript, p. 177.

²⁵⁰ Transcript, pp. 178-179.

²⁵¹ *Id.*

²⁵² Transcript, p. 55.

²⁵³ Transcript, p. 239-240.

²⁵⁴ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See Finding of Fact Numbers 151-152

²⁵⁵ Transcript, p. 209-211, 239-240. See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase*

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173. Public Counsel focused on the costs and payroll associated with the two, sewer only companies, i.e. Mill Creek Sewers, Inc.(operator salary \$4,356); LW Sewer Corporation (operator salary \$8,749), compared those to Roy-L Utilities (operator salary \$8,700), and used the higher payroll of \$8,749 for his recommendation.²⁵⁶ Public Counsel's analysis determined that an operator's salary in the \$8,000 to \$10,000 range would be reasonable to include in Stoddard County's cost structure.²⁵⁷

174. Public Counsel did not independently verify the public information it utilized from the Commission's prior rate cases for its recommendation for operator's expense; part of the same information that Public Counsel faults Bonadio for utilizing without independent verification.²⁵⁸

175. Public Counsel was unaware if the companies it compared to Stoddard County were mechanical or lagoon systems.²⁵⁹

176. Public Counsel was unaware if the operator's cost for the companies that included both water and sewer operations (S. K. & M. Water and Sewer Company and Foxfire Utility Company), that it excluded from its analysis, were based upon the operation of both systems or not.²⁶⁰

177. Public Counsel was unaware of what the sampling requirements are for sewer companies, although it was aware that testing time could vary from fifteen minutes to two hours depending on the company.²⁶¹

178. Public Counsel was unaware of the level of disrepair Stoddard County was experiencing, although its witness agreed that it is reasonable to assume that more labor is required to maintain and operate a system that is in decline and disrepair.²⁶²

179. Public Counsel found it difficult to determine an hourly wage or salary for the operator of a sewer company, and relied upon market information it found on the Internet.²⁶³

Request, Case No. SR-2007-0461. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389.

²⁵⁶ Transcript, pp. 211-214, 230, 239-240.

²⁵⁷ Transcript, p. 214.

²⁵⁸ Transcript, pp. 224-225, 229-230, 239-240, 248-251.

²⁵⁹ Transcript, p. 276-277.

²⁶⁰ Transcript, p. 277-278.

²⁶¹ Transcript, p. 216-217.

²⁶² Transcript, pp. 222, 269-270.

²⁶³ Transcript pp. 241-242, 268-269.

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180. Public Counsel did not provide the Commission with any salary or market comparisons from its Internet searches, nor did it provide any explanation or evidence of how such market information could be verified or authenticated.

181. Given the defects in Public Counsel's analysis, the Commission finds it has less credibility than Bonadio's current analysis or Staff's 2002 analysis, and the Commission will give less weight to Public Counsel's analysis.

182. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, operator expense is \$12,799.

e. Office Supplies

183. Stoddard County's 2006 Annual Report reflects an amount of \$3,843.10 in the category of "Supplies and Expenses, and its 2007 Annual Report lists \$3,508 in that same category.²⁶⁴

184. Stoddard County and R.D. Sewer provided Bonadio with a proposal to recognize an expense for office supplies in the amount of \$3,508.²⁶⁵

185. Bonadio's recommendation for expenses for office supplies was based upon Stoddard County's records and the oral interviews conducted with Mr. and Mrs. Owens.²⁶⁶

186. Bonadio's Report indicates that it reviewed an itemized list of the supplies included in R. D. Sewer's [Stoddard County's] operations and factored out costs for supplies that would be used by Mr. Owens' other business.²⁶⁷

187. Bonadio calculated an actual cost of \$3,065, which it verified by reviewing the company's invoices. Bonadio then rounded that amount up to \$3,100 when developing its recommended cost structure

²⁶⁴ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

²⁶⁵ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁶⁶ Transcript, pp. 64-65

²⁶⁷ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

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for the company.²⁶⁸

188. Staff's 2002 audit reflects an expense for office supplies in the amount of \$180.²⁶⁹ Staff's audit for this expense is outdated and has limited value for comparison.

189. Public Counsel recommends that \$1,340 be allowed for office supplies.²⁷⁰

190. Public Counsel provided no explanation of how it derived its recommendation.²⁷¹

191. Given that Bonadio determined that actual costs for office expenses were \$3,065 and that the Commission has already determined that this method, without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation to be reasonable.

192. Because Public Counsel has not substantiated any methodology for its recommendation, the Commission finds that it is deserving of little weight and lacks credibility.

193. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, office supply expense is \$3,065.

f. Effluent Testing

194. Stoddard County's 2006 Annual Report reflects an amount of \$938.30 in the category of "Effluent Testing Expenses," and its

²⁶⁸ *Id.*; Transcript, pp. 64-65

²⁶⁹ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁷⁰ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁷¹ Mr. Robertson did provide the following general statement during the proceeding: "In connection with this case, at the current -- based on the current cost structure for this time frame. So essentially what I did is I went in and looked at each cost, looked at Bonadio's work papers. Based on my knowledge of small rate case procedures and the recent cases and the 2007 annual report, I then developed the cost structure." Transcript, p. 210-211, 250-251. Mr. Robertson also testified that he reviewed Staff's 2002 Audit, and the Reports from Bonadio and Smith and Company and their associated Workpapers; Transcript, p. 207. However, no relation between what Mr. Robertson calculated for office supplies and Stoddard County's 2007 Annual Report is evident from the evidence Public Counsel offered into the record. Public Counsel adjusted some of the amounts listed in the 2007 annual report to reflect the change in the Consumer Price Index ("CPI") from December 2007 to June of 2008; however, it did not make such an adjustment for office supplies. Transcript, p. 238, 242-243. Public Counsel made the CPI adjustment for the categories of repairs, sludge hauling, utilities, testing, insurance and legal and professional fees. *Id.*

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2007 Annual Report lists \$1,113.60 in that same category.²⁷²

195. Stoddard County and R.D. Sewer provided Bonadio with a proposal to recognize an expense for Effluent Testing in the amount of \$1,252.²⁷³

196. Bonadio's calculated expense for Stoddard County's effluent testing was taken directly from a notice from the effluent testing provider.²⁷⁴

197. Bonadio's report explains:

For 2007 R. D. Sewer [Stoddard County] reported effluent testing expense of \$1,114. An adjustment was proposed to increase this expense to a level of \$1,252, based on a notice received from the supplier. Bonadio has reviewed the notice and has adjusted 2007 effluent testing expense by an increase of \$132.²⁷⁵

198. Staff's 2002 audit reflects a combined expense for Stoddard County in the category of "Testing Supplies and Testing" of \$1,703.²⁷⁶

199. Public Counsel' analysis yielded a recommended expense for effluent testing totaling \$1,241.²⁷⁷

200. Public Counsel relied upon Stoddard County's 2007 Annual Report coupled with a Consumer Price Index ("CPI") adjustment in order to reach its conclusions.²⁷⁸

201. Given that Bonadio determined that actual costs for effluent testing are \$1,252 and that the Commission has already

²⁷² Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-3.

²⁷³ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁷⁴ Transcript, p. 60.

²⁷⁵ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

²⁷⁶ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁷⁷ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁷⁸ Transcript, p. 243.

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determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

202. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, effluent testing expense is \$1,252.

g. Repairs and Maintenance

203. From the time Mr. Owens took over the operation of Stoddard County he has had to implement significant and on-going repairs to the WWTP.²⁷⁹

204. Stoddard County's 2006 Annual Report reflects an amount of \$3,024.39 for repairs to the sewer plant and its 2007 Annual Report lists \$975.00 for that same category.²⁸⁰

205. Stoddard County and R. D. Sewer provided Bonadio no proposal for a specific amount to be allocated for repairs and maintenance.²⁸¹

206. Bonadio based its recommendation that \$2,400 be allocated for repairs and maintenance upon the estimated repair and materials costs in the analysis performed by the engineering firm S. H. Smith & Co., Inc.²⁸²

207. S. H. Smith & Co. relied on information provided by Mr.

²⁷⁹ Transcript, pp. 113-116, 129, 133-136

²⁸⁰ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-3. Stoddard County's 2006 Annual Report specifically reflects repairs made to motors in the amounts of \$989.84 and \$442.84 and a repair made to a pump in the amount of \$300. *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. 3.

²⁸¹ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁸² Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 3, Preliminary Engineering Report; Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 47-48, 101-103.

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Owens to estimate the annual costs for repairs and maintenance, and while this information was not independently verified, S. H. Smith & Co. performed an extensive engineering analysis documenting the current condition of the WWTP and the extensive needs for repair, maintenance and upgrading of the facility.²⁸³

208. Given the current condition of the equipment in the WWTP, it is reasonable to expect that with four pumps and two blowers, one of these devices would fail and require repair at least once every year and a half.²⁸⁴

209. An immediate problem that needs to be addressed is that being an aerated plant, it should have two blowers, but it only has one; and it has two lift stations, each should have two pumps in them, but each one only has one. If the single devices fail, the plant becomes non-operational.²⁸⁵

210. Staff's 2002 audit allocated \$743 for repair and maintenance costs.²⁸⁶ Staff's audit for this expense is outdated and has limited value for comparison.

211. Public Counsel recommends an allocation of \$1012 dollars for repairs and maintenance, based upon adjusting the \$975 from Stoddard County's 2007 Annual Report by the change in CPIs from December 2007 to June 2008.²⁸⁷

212. Public Counsel's witness, Mr. Robertson, would not acknowledge or accept Mr. Owens' sworn testimony regarding the condition of the assets of Stoddard County or with regard to any problems the company was facing with the company's operation and maintenance and repair of equipment.²⁸⁸

213. Mr. Robertson is not an engineer, has never operated a WWTP, and he did not perform an on-site inspection of Stoddard County.²⁸⁹

214. Because Public Counsel would not consider the actual physical condition of Stoddard County's WWTP, described by the other witnesses in this matter and in detail in Smith & Co.'s engineering report,

²⁸³ Transcript, pp. 101-103; Exh. 3, Preliminary Engineering Report.

²⁸⁴ Transcript, pp. 185-186.

²⁸⁵ Transcript, pp. 166-167; Exh. 3, Preliminary Engineering Report.

²⁸⁶ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁸⁷ Transcript pp. 237-238

²⁸⁸ Transcript, p. 222.

²⁸⁹ See Findings of Fact Numbers 57-67.

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Public Counsel's recommendation shall receive less weight in the Commission's decision.

215. Smith & Co. Engineering, an expert in this field, provided the Commission with an extensive report, including a cost analysis for various alternatives to repair, maintain and upgrade Stoddard County's WWTP.²⁹⁰

216. Smith & Co., while relying on Mr. Owens for some information, has demonstrated extensive knowledge of the costs associated with repairing, maintaining and upgrading WWTP.²⁹¹

217. There is no evidence in this record to suggest that Mr. Owens' descriptions of the repairs and maintenance required for Stoddard County's WWTP that was provided to Smith & Co. was in any way inaccurate.²⁹²

218. It was reasonable for Bonadio to rely upon the calculations that Smith & Co. provide to it when performing its analysis of the expenses required for repair and maintenance of Stoddard County's WWTP.

219. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, repair and maintenance expense is \$2,400.

h. Rent

220. Stoddard County's 2006 Annual Report reflects an amount of \$1958.05 for rent and its 2007 Annual Report lists \$2,694.05 for that same category.²⁹³

221. Stoddard County and R.D. Sewer provided Bonadio with a proposal to recognize an expense for Rent in the amount of \$4,200.²⁹⁴

²⁹⁰ Exh. 3, Preliminary Engineering Report.

²⁹¹ *Id.*

²⁹² Mr. Owens was found to be a credible witness and testified as to the condition of the WWTP. Transcript pp. 106-161.

²⁹³ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

²⁹⁴ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D;

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222. Bonadio recommended that \$1,050 be allocated for office rental. Bonadio based its recommendation on the shared use of the facilities by Mr. Owens for all of his water companies and for Stoddard County.²⁹⁵ Bonadio's report explains:

For 2007 R.D. Sewer reported rent expense of \$2,694. R. D. Sewer proposed these expenses be increased to \$4,200 at \$350 per month. Bonadio is of the opinion these costs should be shared by the three water companies and the sewer company. Bonadio estimated the sewer company's share of these costs to be \$1,050. Bonadio recommends that a decrease of \$1,644 be made to 2007 expense for rent.

223. Mr. Owens testified that he believed that Bonadio's estimate was low because Bonadio did not include another small office that he utilizes for Stoddard County when preparing its analysis.²⁹⁶

224. Staff's allocation of \$0 for rent in its 2002 audit is now outdated and can no longer be considered to be accurate for purposes of comparison.²⁹⁷

225. Although Public Counsel provided no explanation on how it made its determination on rent expense, it is in agreement with Bonadio's recommended allocation of \$1,050 for rental expense.²⁹⁸

226. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, repair and maintenance expense is \$2,400.

i. DNR Annual Operating Permit Fee

227. DNR operating permits are based upon the plant capacity.²⁹⁹

228. Stoddard County's 2007 annual report does not reflect a specific line item for the expense of a DNR operating permit; however,

Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁹⁵ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Transcript, pp. 68-69.

²⁹⁶ Transcript, p. 150.

²⁹⁷ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

²⁹⁸ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, p. 244.

²⁹⁹ Transcript, p. 272.

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their expense report to Bonadio included a proposed allocation for \$3,000 for this permit.³⁰⁰

229. Bonadio recommended an allocation of \$3,000 for Stoddard County's DNR operating permit.³⁰¹

230. Smith and Co. reports that there was an error in Stoddard County's DNR permit that listed the plant as being a 75,000 gallon per day plant and that there was no indication that Stoddard County had attempted to correct the permit.³⁰² This error had occurred in relation to a planned expansion for the WWTP that did not occur.³⁰³

231. Bonadio's recommendation for an allocation of \$3,000 for the DNR permit fee was made without knowledge of the error in permitted design capacity for Stoddard County.³⁰⁴

232. Staff's 2002 audit lists an allocation for the DNR permit of \$3,000.³⁰⁵

233. The design capacity of Stoddard County is 25,000 gallons per day and this is currently in line with the company's DNR permit.³⁰⁶

234. The actual gallon flow per day of Stoddard County's WWTP is uncertain, but based upon water usage, the estimated actual flow is near at least 33,000 gallons per day.³⁰⁷

235. Smith and Co.'s Preliminary Engineering Report documents that, based upon the WWTP's current design capacity, the population the WWTP serves and DNR regulations, the current treatment system is only capable of adequately removing BOD from a peak flow of 25,000 gallons per day but instead is consistently faced with flows reaching a maximum of 65,200 gallons per day.³⁰⁸

236. Stoddard County's DNR permit is currently correct for a

³⁰⁰ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 9, Balance Sheet, Sewer Operating Revenues, Expenses and Statistics, p. S-1.

³⁰¹ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³⁰² Transcript, p. 104; Exh. 3, Preliminary Engineering Report. See also Finding of Fact Numbers 94(b) and (n), 356-357.

³⁰³ *Id.*

³⁰⁴ Transcript, pp. 73-74.

³⁰⁵ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³⁰⁶ Transcript, p. 166

³⁰⁷ Transcript, p. 165-166.

³⁰⁸ Exh. 3, Preliminary Engineering Report, pp. 8-9.

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25,000 gallon per day WWTP, and that the correct fee for a plant this size is \$2,500, even if the plant is actually receiving and treating between 25,000 and 65,200 gallons per day.³⁰⁹

237. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the DNR permit expense is \$2,500.

j. Utilities

238. Exemplifying Stoddard County's revenue deficit, Stoddard County's electric bill for the month of July exceeded the company's revenue for that same month.³¹⁰

239. Stoddard County's 2006 Annual Report reflects an amount of \$7,456.04 for its purchased power expense and \$127.92 for purchased water expense, for a total of \$7,583.96.³¹¹

240. Stoddard County's 2007 Annual Report reflects an amount of \$7,372.84 for its purchased power expense and \$118.82 for purchased water expense, for a total of \$7,491.66.³¹²

241. Stoddard County and R. D. Sewer provided Bonadio with a proposal to recognize an allocation for utility expenses of \$8,500.³¹³

242. Bonadio determined that \$8,500 should be allocated for utility costs.³¹⁴ Bonadio's Report explains:

During 2007 R. D. Sewer [Stoddard County] incurred purchased power expense of \$7,372 and purchased water expense of \$119 for a total of \$7,491. An adjustment was proposed to increase this expense by \$1,009 to \$8,500 based on

³⁰⁹ Transcript, pp. 243, 272-273.

³¹⁰ Transcript, p. 129. Mr. Owens testified that he collected a little over \$700.00 in revenue in July and his electric bill was \$963.00. *Id.*

³¹¹ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1, S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1, S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1, S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1, S-3.

³¹² *Id.*

³¹³ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³¹⁴ Transcript, pp. 47, 58-59; Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

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a projected increase for the year as a result of higher fuel costs. The engineering firm, S. H. Smith & Co., Inc. estimates the utility costs to be \$9,600. Accordingly, Bonadio finds that the proposed increase is reasonable and has increased 2007 expense by \$1,009 to a level of \$8,500.³¹⁵

243. Bonadio's calculations were based upon a review of Stoddard County's invoices and the actual utility cost was \$8,236, which it then rounded up to \$8,500.³¹⁶

244. Staff, in its 2002 audit determined that \$9,484 was Stoddard County's expense for utilities.³¹⁷ While Staff's audit is outdated, it does serve as a basis of comparison in this instance, because, as was already determined by the Commission, the day-to-day costs of the WWTP are not expected to have decreased since 2002.

245. Public Counsel used the expense documented for utilities from Stoddard County's 2007 annual report (i.e. \$7,372) and performed a CPI adjustment to derive his recommendation that \$8,219 be allocated for utility expenses.³¹⁸

246. Given that Bonadio determined that actual costs for utility expenses are \$8,236 and that the Commission has already determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

247. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, utility expense is \$8,236.

k. Telecommunications

248. Stoddard County's annual reports from 2006 and 2007 do not have a separate line item listed for telecommunications expense.³¹⁹

249. Stoddard County and R. D. Sewer provided Bonadio with a proposed cost structure reflecting an allocation of \$3,060 for

³¹⁵ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³¹⁶ Transcript, pp. 58-59.

³¹⁷ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³¹⁸ Transcript, p. 242; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³¹⁹ Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheet.

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telecommunications expenses.³²⁰

250. Bonadio based its recommendation for telecommunications cost upon a review of specific invoices provided by Stoddard County. These were actual costs based upon 12 months of expenditures.³²¹

251. Bonadio's analysis included charges for cable and Internet service. Bonadio determined that Internet service was essential for the company and there was no way to separate out cable charges from the package received by Stoddard County.³²² Bonadio found that separating such charges would have been negligible to its analysis.³²³

252. Bonadio further explained in its report that:

For 2007 R. D. Sewer [Stoddard County] reported no telecommunications expense. These costs were paid through some other company. R. D. Sewer [Stoddard County] proposed these expenses be increased to \$3,060. A review of actual 2007 telephone and internet bills indicated the total annual costs of these services was \$3,333. Bonadio is of the opinion these costs should be shared by the three water companies and the sewer company. Bonadio estimated the sewer company's share of these costs to be \$834. Bonadio recommends that an increase of \$834 be made to 2007 expense for telecommunications expenses.³²⁴

253. Bonadio did not separate out any telecommunications that were for personal use as opposed to being in connection with Stoddard County's business operations.³²⁵

254. Bonadio found the fees for telecommunications services to be fixed fees and not minute by minute purchases.³²⁶

255. At the time of Staff's 2002 audit, Stoddard County was claiming \$1,175 in telecommunications expenses and Staff determined

³²⁰ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Transcript, pp. 65-69.

³²¹ Transcript, pp. 65-69.

³²² *Id.*

³²³ Transcript, p. 66.

³²⁴ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³²⁵ Transcript, pp. 65-69.

³²⁶ Transcript, p. 67.

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that \$860 was the appropriate amount for these expenses.³²⁷ While Staff's audit is outdated, it does serve as a basis of comparison in this instance, because, as was already determined by the Commission, the day-to-day costs of the WWTP are not expected to have decreased since 2002.

256. Public Counsel recommended the allocation for phone expenses should be set at \$309.³²⁸

257. Public Counsel provided no explanation of the method it employed to determine the phone expenses it built into its recommended cost structure for Stoddard County's telecommunication services.³²⁹

258. Because Public Counsel has not substantiated any methodology for its recommendation, the Commission finds that it is deserving of little weight and lacks credibility.

259. Given that Bonadio determined what Stoddard County's actual costs were for its share of telecommunications expenses, and that the Commission has already determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

260. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, telecommunications expense is \$834.

I. Sludge Hauling

261. Smith and Co. prepared a very precise calculation of the sludge hauling requirements of Stoddard County, relying, in part, on information concerning sludge hauling that was provided to them by Stoddard County.³³⁰

262. To verify the information it received from Stoddard County, Smith and Co. compared it to other projects it completed and with other Missouri regulated utilities and found the information to be "right in line" with those projects and utilities.³³¹

263. Smith and Co. also performed specific calculations regarding the WWTP's sludge holding basin, and determined that the

³²⁷ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³²⁸ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³²⁹ See Transcript, pp. 206-282.

³³⁰ Transcript, p. 101-102.

³³¹ *Id.*

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system produces 13.5 dry tons of sludge per year.³³²

264. Smith and Co. reported that the effluent from the WWTP is extremely cloudy and there is sludge buildup near the mouth of the effluent pipe.³³³

265. DNR violations Numbers 17390, 17514, from 1998 and 1999 respectively, cited Stoddard County for failure to file its annual sludge reports and all of the DNR violations issued for Stoddard County indicate problems with the effluent from the WWTP.³³⁴

266. The prior operator of Stoddard County's WWTP (Mr. Bien) used a poor settling agent for sludge that impaired the system's proper operation. Despite current attempts to rectify this situation, the system is still not working correctly with this regard.³³⁵

267. Sludge hauling expenses will not change based upon whether a utility is regulated or unregulated.³³⁶

268. Stoddard County's 2006 Annual Report reflects an amount of \$725 for rent and its 2007 Annual Report lists \$400 for that same category.³³⁷

269. Stoddard County provided Bonadio with a proposed cost structure reflecting an allocation of \$3,800 for sludge hauling expenses.³³⁸

270. Bonadio based its determination of sludge hauling expenses on the information provided to it by Smith and Co.³³⁹

271. Bonadio's report concerning its recommendation for sludge hauling expense stated:

³³² Exh. 3, Preliminary Engineering Report, p. 5.

³³³ *Id.*

³³⁴ See also EFIS Docket No. 9, *Missouri Department of natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008. See also Findings of Fact 364 and 367.

³³⁵ Transcript, p. 115.

³³⁶ Transcript, p. 105.

³³⁷ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-3.

³³⁸ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 65-69.

³³⁹ Transcript, pp. 59-60.

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During 2007 R.D. Sewer incurred sludge hauling expenses of \$400. An adjustment was proposed to increase this expense by \$3,400 based on a projected hauling cost of \$600 per haul done 4 times a year and projected cost of hauling at \$175 per haul done 4 times a year at each of the two lift stations. The engineering firm, S. H. Smith & Co., Inc. estimates the sludge hauling costs to be \$1,800. Based on actual 2007 and 2006 costs incurred by R.D. Sewer and the engineering projection, Bonadio finds an estimated cost of \$1,800 to be more reasonable and has increased the 2007 expenses by \$1,400.³⁴⁰

272. Bonadio, when making its recommendation on sludge hauling expenses had no reason to independently verify the figures Smith and Co. had provided to him regarding Stoddard County's sludge hauling expenses.³⁴¹

273. Staff's 2002 audit included no allocation for sludge hauling.³⁴² Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

274. Public Counsel recommended a sludge hauling expense allocation of \$446.³⁴³

275. Public Counsel, based his recommended allocation for sludge hauling on Stoddard County's 2007 Annual Report, adjusted for CPI.³⁴⁴

276. Because Public Counsel did not factor the actual physical condition of Stoddard County's WWTP, described by the other witnesses in this matter and in detail in Smith & Co.'s engineering report and the DNR notices of violations, Public Counsel overlooked the fact that Stoddard County is significantly behind on its sludge hauling requirements and the 2007 Annual Report does not accurately reflect the required expense for this line item. Consequently, Public Counsel's recommendation shall receive less weight in the Commission's decision.

277. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, sludge hauling expense is

³⁴⁰ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³⁴¹ Transcript, p. 59.

³⁴² Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³⁴³ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³⁴⁴ Transcript, pp. 242-243.

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\$1,800.

m. Uncollectibles

278. Stoddard County has a history of difficulty with collecting payments from customers.³⁴⁵

279. Stoddard County's annual reports for 2006 and 2007 list uncollectible expenses as being \$2,676.90 and \$2,980.30 respectively.³⁴⁶

280. Bonadio's report concerning its recommendation for uncollectible expenses stated:

R. D. Sewer reported uncollectible accounts expense for 2007 in the amount of \$2,980. Adjustments were proposed to decrease this expense to \$500 for rate-making purposes. This is a reasonable estimate of future bad debts based on past history. Prior annual reports provided to the Public Service Commission had reported overstated expenses for uncollectible accounts. The amounts reported represented the cumulative uncollected balances for the reported customers and did not change in 2005, 2006, or 2007. Therefore, Bonadio recommends that uncollectible accounts be decreased by \$2,480.

281. Bonadio's calculation for uncollectible expenses was based upon Bonadio's and Stoddard County's experience, and no additional verification was required because comparison of this company's uncollectible expenses with other Missouri utilities would not be indicative of Stoddard County's experience.³⁴⁷

282. Staff's 2002 audit included no allocation for uncollectible expenses.³⁴⁸ Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

283. Public Counsel recommended an uncollectible expenses allocation of \$303.³⁴⁹

³⁴⁵ Transcript, pp. 131-132.

³⁴⁶ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, pp. 6, S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, pp. 6, S-1.

³⁴⁷ Transcript, p. 79.

³⁴⁸ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³⁴⁹ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

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284. Public Counsel provided no explanation of how it derived its recommendation.³⁵⁰

285. Because Public Counsel has not substantiated any methodology for its recommendation, the Commission finds that it is deserving of little weight and lacks credibility.

286. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, uncollectible expense is \$500.

n. Insurance

287. Stoddard County's annual reports for 2006 and 2007 list \$427.49 and \$529.82 for the company's insurance expenses respectively.³⁵¹

288. Bonadio's report concerning its recommendation for the allocation of insurance expenses stated:

R.D. Sewer's [Stoddard County] 2007 operations reflect insurance expense of \$530. R. D. Sewer [Stoddard County] proposed these expenses be increased to \$1,499. Documentation was provided to support liability insurance for the plant in the amount of \$1,011 and auto insurance in the amount of \$490 for a total of \$1,501. Therefore; for rate-making purposes, Bonadio has increased 2007 insurance expense by \$971 to \$1,501.

289. Bonadio examined Stoddard County's invoices for insurance, which historically totaled \$1,350, and examined the insurance policies of the company and determined that insurance for one company vehicle should be \$415. Bonadio, according to its workpapers rounded this figure up to \$500.³⁵²

290. Bonadio's analysis also determined that \$1,011 was appropriate for the company's liability insurance premiums to cover the

³⁵⁰ Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheet. While Public counsel provided no explanation, the Commission notes that the difference between Stoddard County's reported uncollectible expenses for the years 2006 and 2007 is \$303.40.

³⁵¹ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

³⁵² Transcript, p. 69-71.

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WWTP.³⁵³

291. Staff's 2002 audit included no allocation for insurance expenses.³⁵⁴ Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

292. Public Counsel recommended an insurance expense allocation of \$591.³⁵⁵

293. Public Counsel, based his recommended allocation for insurance expenses on Stoddard County's 2007 Annual Report, adjusted for CPI.³⁵⁶

294. Given that Bonadio determined that the actual costs for insurance for one company vehicle should be \$415, and given that the Commission has already determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

295. There was no controverting evidence presented to substantiate that \$1,011 was not a reasonable amount of expense for liability insurance premiums to cover the WWTP.

296. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, insurance expense, including automobile and liability insurance, is \$1,416.

o. Legal and Professional

297. Stoddard County's Annual Reports for 2006 and 2007 list a line item for "outside services" (legal and accounting) of \$705 and \$592 respectively.³⁵⁷

³⁵³ Exh. 1. During the evidentiary hearing Mr. Shepard, testifying for Bonadio was only questioned about the company's automobile insurance premiums. See generally Transcript, pp. 33-84.

³⁵⁴ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³⁵⁵ Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³⁵⁶ Transcript, pp. 242-243. Mr. Robertson, testifying for Public Counsel, stated that he believed Stoddard County's automobile insurance policy had personal vehicles on it in addition to company vehicles and did not believe Bonadio properly separated out individual costs for the vehicles. Mr. Robertson did not address the fact that Bonadio's auto insurance calculation was lower than his and Mr. Robertson not address the subject of liability insurance at all for the WWTP. Transcript, p. 243.

³⁵⁷ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending*

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298. Stoddard County's Annual Reports for 2006 and 2007 list a debt owed to the Holden Law Firm in the amount of \$2,617.83.³⁵⁸

299. Steven Holden, from the Holden Law Firm, is one of the attorneys representing Stoddard County in this matter.³⁵⁹

300. Bonadio's report concerning its recommendation for the allocation of legal and professional expenses stated:

R. D. Sewer [Stoddard County] reported legal and professional fees of \$592 in its 2007 operations. An adjustment was proposed to increase this expense to \$3,600. These fees were for accounting services and attorney fees. The average costs of these services for the last three years were \$650. The accounting services currently provided are inadequate and has resulted in inaccurate reporting and will need to be increased to ensure quality of service. Bonadio is of the opinion that the legal and professional fee should be increased by \$408 to \$1,000.

301. Staff's 2002 audit included no allocation for legal and professional expenses.³⁶⁰ Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

302. Legal expenses have increased for Stoddard County since the time Staff conducted its 2002 audit.³⁶¹

303. Public Counsel recommended an allocation for legal and professional expenses of \$584.³⁶²

304. Public Counsel arrived at this figure by performing a CPI adjustment on the \$552 reported for the cost of having H&R Block prepare Stoddard County's taxes in 2007.³⁶³

305. Public Counsel did not recommend any expense amount be considered for legal fees, stating that any reasonable and prudent legal expenses could be recovered in a subsequent rate case.³⁶⁴

December 31, 2006, p. S-1; Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007, p. S-1.

³⁵⁸ *Id.*

³⁵⁹ See EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008.

³⁶⁰ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³⁶¹ Transcript, p. 188.

³⁶² Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³⁶³ Transcript, pp. 218-219, 242-243, 255-259.

³⁶⁴ Transcript, pp. 218-219, 242-243, 255-259, 280.

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306. Public Counsel did not believe that legal expenses could be very high for a small sewer company and its witness, Mr. Robertson, stated that he believed the company could represent itself, through its operator, in DNR negotiations.³⁶⁵

307. Stoddard County is facing many legal problems, problems that prolonged these proceedings.³⁶⁶

308. Any legal expenses incurred by Stoddard County would need to be normalized to determine a proper annual allocation.³⁶⁷

309. Stoddard County was represented by legal counsel at the local public hearing held in this matter on June 4. That hearing's duration was approximately 45 minutes in length.³⁶⁸

310. Stoddard County was represented by legal counsel at the evidentiary hearing held in this matter on August 13. That hearing's duration was approximately five and a half hours in length.³⁶⁹

311. Stoddard County's legal counsel filed 10 pleadings with the Commission during the course of this proceeding and will be filing status reports regarding the company's progress with negotiating and executing a compliance agreement with DNR.³⁷⁰

312. Stoddard County will require legal representation in any subsequent rate case before this Commission, and has agreed to initiate such a case within 30 days of this order becoming effective.³⁷¹

313. Stoddard County faces potential other legal fees associated with purported encumbrances on the assets of the WWTP.

314. Section 536.085(4) provides definition for reasonable attorney's fees in contested administrative cases where a party prevails against the state pursuant to Section 536.087. Those attorney's fees are capped at \$75.00 per hour, unless the court determines that a special factor justifies a higher fee.

315. Missouri courts have found attorney's fees ranging from \$75.00 per hour to \$200.00 to be reasonable.³⁷²

³⁶⁵ Transcript, pp. 218-219, 242-243, 255-259, 273-275.

³⁶⁶ Transcript, pp. 227, 236, 273-275.

³⁶⁷ Transcript, p. 274.

³⁶⁸ Transcript, Volume 2.

³⁶⁹ Transcript, Volume 3.

³⁷⁰ See EFIS Docket Numbers 1, 10, 11, 14, 33, 42, 43, 50, 66, and 67.

³⁷¹ Transcript, p. 137.

³⁷² *In re C.W.*, 257 S.W.3d 155, 158 (Mo. App.2008); *Wallace v. Wallace*, 2008 WL 4402435, 9 (Mo. App. 2008)); *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334 (Mo. App.2006); *Washington v. Jones*, 154 S.W.3d 346, 352 (Mo. App. 2004); *H.S.H. ex rel. R.A.H. v. C.M.M.*, 60 S.W.3d 656, 659 (Mo. App. 2001); *McIntosh v. McIntosh*, 41 S.W.3d

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316. Public Counsel's recommendation, having not factored in any expense for legal fees, is artificially low and diminished in its credibility.

317. Bonadio's recommendation, while acknowledging the need for improved and more expensive accounting service, also did not factor in expenses for legal services and while it is credible with regard to accounting expenses, its recommendation will be given less weight with regard to legal expenses.

318. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, legal and professional expenses are \$2,000.

p. Depreciation Expense and Return on Investment

i. Depreciation

319. Stoddard County's Annual Reports for 2006 and 2007 list a line item for depreciation expenses of \$3,675.70 and \$5,406.72 respectively.³⁷³

320. Bonadio recommended an allocation of \$5,400 for depreciation expense.³⁷⁴

321. Bonadio made its recommendation based the information contained in Stoddard County's Annual Reports, its inventory and its fixed assets.³⁷⁵ Bonadio's Report stated:

R.D. Sewer reported depreciation expense of \$5,407 for 2007 which it proposed to decrease by \$7, to the projected 2008 level of \$5,400. Bonadio concurs with the depreciation expense estimate and therefore recommends a decrease of \$7 be included for rate-making purposes.

322. Staff's 2002 audit allocates \$4,150 for depreciation

60, 73 (Mo. App. 2001); *Dildine v. Frichtel*, 890 S.W.2d 683, 687 (Mo. App.1994); *American Bank of Princeton v. Stiles*, 731 S.W.2d 332 (Mo. App. 1987).

³⁷³ Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

³⁷⁴ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³⁷⁵ Transcript, pp. 75-76.

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expenses.³⁷⁶

323. The 2002 audit is not completely accurate because there has been more investment in plant and depreciation.³⁷⁷

324. It is unclear from the record if depreciation that has been collected since 2002 has exceeded the amount invested in plant since that time; however, to the extent that Mr. Owens contributed more to the WWTP than has been depreciated in the past six years, rate base would increase.³⁷⁸

325. The Commission does not allow a return on plant if a company has no investment in that plant.³⁷⁹

326. Public Counsel recommends that no amount be allocated for depreciation because it believes that Mr. Owens has no investment in the Stoddard County and should not earn a return on the plant or for depreciation.³⁸⁰

327. In prior Commission cases involving rate increase requests for small water and sewer companies, the Commission has approved the following depreciation rates:³⁸¹

Account Number	Account Description	Depreciation Rate	Average Service Like (Years)
311 (351)	Structures & Improvements	2.5%	40
352.1	Collection Sewers(Force)	2.5%	40
352.2	Collection	2.0%	50

³⁷⁶ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³⁷⁷ Transcript, pp. 186-187, 192-193. Mr. Merciel, testifying for Staff, stated that he still believes Staff's audit is the best information that Commission has available in terms of a full accounting for these expenses. *Id.*

³⁷⁸ Transcript, pp. 192-193.

³⁷⁹ Transcript, pp. 204.

³⁸⁰ Transcript, pp. 219-220, 235, 238-239; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

³⁸¹ See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461; *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389.

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	Sewers(Gravity)		
353	Other Collection Plant	4.0%	--
354	Services to Customers	2.0%	50
355	Flow measurement Devices	3.3%	30
362	Receiving Wells and Pump Pits	4.0%	25
363	Electric Pumping Equipment	10.0%	10
372	Oxidation Lagoons	4.0%	--
373	Treatment & Disposal Facilities	4.5% - 5.0%	20
375	Outfall Sewers	2.0%	--
391	Office Furniture & Equipment	5.0%	20
391.1	Office Computer Equipment	14.3%	7
392	Transportation Equipment	12.5%	8
395	Laboratory Equipment	5.0%	20

328. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the appropriate allocation for depreciation is \$0.

ii. Return on Investment

329. Mr. Owens has not paid any costs for acquiring the assets of the WWTP.³⁸²

330. Mr. Owens currently has an oral agreement to acquire the assets of the WWTP, the terms of which do not require any payment for the assets.³⁸³

331. No WWTP assets have been taken out of service since the time Mr. Owens has taken over operation of the WWTP.³⁸⁴

332. Mr. Owens has placed approximately \$17,000 worth of new or refurbished equipment into service in the past three years,

³⁸² Transcript, p. 133.

³⁸³ Transcript, p. 138.

³⁸⁴ Transcript, p. 136.

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including two-blowers, two grinder pumps, and an electric motor – all with the assistance of loans from Maco.³⁸⁵

333. Stoddard County's 2007 Annual Report reflects the exact amount owed to Maco that was provided to Stoddard County for these investments is \$17,388.88.³⁸⁶

334. Stoddard County's 2007 Annual Report reflects the addition of a new grinder pump at the cost of \$2,078.00.³⁸⁷

335. The new or refurbished equipment Mr. Owens contributed to plant is being used and is useful to the provision of sewer service to Stoddard County's customers.³⁸⁸

336. Stoddard County and R. D. Sewer provided a proposal to Bonadio to recover \$7,021 for a return on its investment.³⁸⁹

337. Bonadio recommended an allocation of \$7,021 for a return on plant. Bonadio's report concerning its recommendation for the allocation for return on investment stated:

R. D. Sewer [Stoddard County] did not include any amount for return on plant for 2007. An adjustment was proposed to include return on plant expense at an estimated level of \$7,021. Bonadio calculated a return amount based on an 11% rate of return on the assets in service as of December 31, 2007. Net assets in service were \$63,826 as reported on the 2007 Public Service Commission Annual Report. Accordingly, Bonadio has included return on plant expense of \$7,021 for ratemaking purposes.

338. Bonadio obtained the information regarding the 11% rate of return from Mr. Merciel and did not compare that rate with other Commission cases.³⁹⁰

339. In the five prior Commission rate cases involving small water and sewer companies (the ones reviewed by Bonadio and Public

³⁸⁵ Transcript, pp. 133-136.

³⁸⁶ Exh. 9 Exh. 9, Balance Sheet; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. 10.

³⁸⁷ Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007, p. 3. Stoddard County has also incurred other expenses for repairs on some of the motors: "like \$3- or \$400 at different times." Transcript, p. 135.

³⁸⁸ Transcript, pp. 126-128.

³⁸⁹ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

³⁹⁰ Transcript, p. 77.

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Counsel) the rate of return approved by the Commission has ranged from 8.88% to 10.09%.³⁹¹

340. Public Counsel recommends that no amount be allocated for return on plant because it believes that Mr. Owens has no investment in the Stoddard County.³⁹²

341. Once an owner/operator contributes equipment to the utility, as long as it is a reasonable and prudent expense, then it is appropriate to allow the owner/operator to earn a return and recovery of it.³⁹³

342. When asked by Commissioner Murray how Mr. Owens' investment in plant equipment should be categorized, where Mr. Owens acquired new equipment and refurbished old equipment, Mr. Robertson, testifying for Public Counsel, replied that depending on the amount of the expense it would be classified as being an operating expense or being capital. Mr. Robertson further stated that the difference in these classifications was based upon the dollar amount invested and that once the investment exceeded the threshold of \$1000 it would be classified as being capital as opposed to being an expense. According to Mr. Robertson, an expense would be factored into repairs and maintenance and updated for CPI and contributions to plant are allowed to earn a return and recovery of depreciation.³⁹⁴

343. Applying Mr. Robertson's definition of expenses and plant to Mr. Owens' investment of \$17,388.88 into replacing or refurbishing blowers, grinders and electric motors, the Commission finds Mr. Owens' investments to be contribution to plant.

344. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the appropriate allocation for return on investment is \$1,721.

³⁹¹ See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389. The rate of return allowed in Foxfire was 9.92%; in S. K. & M. was 10.09%; in Roy-L Utilities was 8.88%; in L.W. Sewer a return on Equity of 7.00% was allowed and in Mill Creek no rate of return was allowed.

³⁹² Transcript, pp. 219-220, 231-232, 276

³⁹³ Transcript, p. 234.

³⁹⁴ Transcript, pp. 235-236.

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q. Total Revenues

345. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining Stoddard County's current cost structure the company's normalized operating revenues are \$21,970.³⁹⁵

346. While serving as a benchmark for comparison, Staff's allocation of \$20,093 for operating revenues in its 2002 audit is now outdated and can no longer be considered to be accurate.³⁹⁶

347. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the total revenue is \$21,970.

r. Net Revenue Requirement

348. As previously noted, the parties analyses/proposals result in the following recommendations for Stoddard County's net revenue requirement:³⁹⁷

Analyses/Proposals	Stoddard County	Public Counsel	Bonadio	Staff's 2002 Audit
Total Cost of Service (Total Revenue Requirement)	\$82,289	\$29,720	\$58,667	\$48,074
Total Revenues	\$21,970	\$21,970	\$21,970	\$22,093
Net Revenue Deficit	\$60,319	\$7,750	\$36,697	\$25,981

349. Mr. Owens has the technical, managerial and financial experience required to operate Stoddard County and continue to operate

³⁹⁵ Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. Bonadio explained in detail: "R.D. Sewer reported in its annual report operating revenue in the amount of \$24,119 for 2007. Based on R.D. Sewer's current tariff rate of \$11.40 per month for houses/duplexes and \$9.12 per month for apartments and a customer level of 115 and 57 for houses/duplexes and apartments, respectively, Bonadio has calculated normalized operating revenues to be \$21,970. The customer base is expected to stay the same. This results in a decrease over 2007 reported revenues of \$2,149." Exh. 1, p. 2. Transcript, p. 212.

³⁹⁶ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

³⁹⁷ Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

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it if the transfer of assets is approved.³⁹⁸

350. Mr. Owens testified that based upon his technical, managerial and financial experience he needs a 100% increase in Stoddard County's rates to provide safe and adequate sewer service to WWTP's customers.³⁹⁹

351. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds Stoddard County's total cost of service is \$44,830; its total revenue is \$21,970; and its net revenue deficit is \$22,860.

G. The Provision of Safe and Adequate Service

352. Since January of 1987, Stoddard County has experienced problems with the quality of its effluent.⁴⁰⁰

353. DNR inspectors have documented that the aeration units of the WWTP were inoperable at times causing dangerous septic conditions in the outflow channel for the effluent. The effluent flows into an unnamed tributary and then into Cane Creek. The effluent then travels from Cane Creek to Dudley Main Ditch and then into the Saint Francis River.⁴⁰¹

354. Stoddard County, while under Mr. Bien's operation, failed to meet the requirements for filing its discharge monitoring reports. This was a violation of Stoddard County's National Pollution Discharge Elimination System ("NPDES") permit number MO-0096881 which expired November 20, 1985.⁴⁰²

355. In October of 1987, DNR conducted a "stream survey" of the outflow channel for Stoddard County's effluent. According to DNR, extensive algae mats on the stream substrate indicated that the Stoddard County effluent was a likely nutrient source which is harmful for aquatic life in the stream.⁴⁰³

356. In June of 1988, DNR denied Stoddard County's Missouri State Operation Permit renewal request and issued an

³⁹⁸ Transcript, p. 128. Mr. Owens has demonstrated his abilities over the six years he has operated the WWTP and his many years of experience operating his water companies.

³⁹⁹ Transcript, p. 129.

⁴⁰⁰ Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10. See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

⁴⁰¹ Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10. See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

⁴⁰² *Id.*

⁴⁰³ *Id.*

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abatement order.⁴⁰⁴

357. In response to DNR's abatement order, Mr. Bien obtained the services of a certified operator and an engineer to re-evaluate the WWTP and design necessary upgrades. Subsequent to this re-evaluation, Mr. Bien applied to the DNR for a construction permit to expand the WWTP to 75,000 gpd by August of 1990. DNR completed the engineering review, but the construction permit was never issued.⁴⁰⁵

358. When DNR renewed Stoddard County's Missouri State Operating Permit, it mistakenly modified the permit by increasing the design capacity of the old WWTP to 75,000 gpd, the design flow of the proposed WWTP.⁴⁰⁶

359. The WWTP upgrade was never constructed, and violations related to effluent Biological Oxygen Demand (BOD) and Total Suspended Solids (TSS) continued to be a problem.⁴⁰⁷

360. Chronic poor performance and non-submittal of monitoring reports resulted in Stoddard County being placed on the annual noncompliance list in 1997.⁴⁰⁸

361. In June of 1998, septic conditions in the plant were again documented by DNR. An inspection in late July of 1998 revealed that the plant was again without a certified operator, was poorly operated, and was over its design capabilities. Monitoring reports were not being submitted and operational control testing was not being performed.⁴⁰⁹

362. Because of the continued DNR compliance issues, Stoddard County was referred to DNR's enforcement section in May of 1999. DNR enforcement section personnel found Mr. Bien uncooperative concerning compliance issues and by October of 1999, the enforcement section referred Stoddard County to the Attorney General's Office (AGO) for formal legal action to compel compliance.⁴¹⁰

363. On May 17, 2000, DNR received documentation of Mr. Bien's death; however, due to continued poor operation and water quality issues, the AGO decided to proceed with litigation.⁴¹¹

364. On May 27, 2004, the DNR Southeast Regional Office (SERO) received a complaint of sewage bypassing from a lift station

⁴⁰⁴ *Id.*

⁴⁰⁵ Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10; Transcript, pp. 104,164-167.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

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near Westbridge Apartments, formerly known as Grant Apartments, and flowing into a nearby-unnamed tributary. The single pump that served the station failed and a back-up pump was not available. SERO confirmed that the bypass was eventually stopped on July 6, 2004, but the repairs that were made were only temporary. During the time it took to stop the bypass, untreated wastewater flowed from a manhole and into the unnamed tributary at an approximate rate of 10,000 gallons per day.⁴¹²

365. In addition to the documented history of environmental violations delineated in Findings of Fact Numbers 351 through 364, the Commission adopts, as findings of fact, the issuance of all of the DNR violation notices that are listed DNR's compliance report filed in this case and that are listed in the procedural history section of this order.⁴¹³

366. The plant has failed to meet the parameters related to the levels of BOD and TSS in the plant's effluent discharged into Cane Creek on a consistent basis.⁴¹⁴

367. According to the testing documentation, during the 33 month period between May of 2005 and January of 2008, the WWTP was above maximum allowable BOD and TSS levels for 22 months, or 67% of the time. This indicates that the system is drastically overloaded and undersized.⁴¹⁵

368. The visible results of the lack of BOD and TSS reduction include but aren't limited to sludge accumulation in the creek, excessive algae growth near the treatment plant's effluent pipe and in the creek bed, and severe discoloration of the creek water. The BOD that is being released into Cane Creek is harmful to not only the immediate discharge area but also the area downstream of the WWTP.⁴¹⁶

⁴¹² *Id.* Part of the loans provided by Maco were used to replace a pump at the lift station near the Westbridge apartments to stop the major sewage bypass which had been occurring. *Id.*

⁴¹³ See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

⁴¹⁴ Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10.

⁴¹⁵ Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10. According to the treatment plant's last operating permit issued March 3, 1995 and expired June 15, 1999, the maximum permitted BOD levels were 45 mg/L as a weekly average and 30 mg/L as a monthly average. There was no daily maximum on the permit but the effluent BOD reading cannot be very much higher than the weekly average. The observed maximum level during the 2005 to 2008 time period for BOD was 203 mg/L and 272 mg/L for TSS. *Id.*

⁴¹⁶ *Id.* Since the harmful organic material that is meant to be neutralized through the system's aeration process is being released into Cane Creek, dissolved oxygen in the creek is being depleted. The reduction in dissolved oxygen removal creates a very harmful

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369. A review of testing results from the independent lab that provides Stoddard County's testing data supports the idea that some outside source, i.e. the dumping of waste from surrounding septic systems into the collection system, could possibly be forcing an extremely high peak BOD loading on the system.⁴¹⁷

370. Stoddard County, under the operation of Mr. Owens, is currently engaged in negotiations with the DNR to arrange and execute a settlement agreement with a compliance schedule to bring the company back into compliance with all environmental regulations.⁴¹⁸

371. Because of the history of, and the continued violations of, Missouri DNR regulations, Missouri Clean Water Act Violations and NPDES requirements, Stoddard County is not providing safe and adequate service.

III. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

A. Jurisdiction, Application of Section 393.190, Standard for Evaluating the Transfer Application, Burden of Proof, Public Interest Defined and Standard for Granting Interim Relief⁴¹⁹

1. Commission Jurisdiction and Authority

Section 386.020(42) defines "public utility" as including "every . . . sewer corporation . . . as [this term is] defined in this section, and

situation for any aquatic life in Cane Creek. Without the normal levels of oxygen in the creek there undoubtedly has been a severe stunting in the growth of plant and aquatic life in the creek. Not only do the microorganisms consume oxygen but they also cause life threatening diseases in humans. Unsuspecting children that play near Cane Creek downstream of the WWTP are in danger due to the existing treatment system. *Id.*

⁴¹⁷ *Id.* According to the plant operator, the local police have made it a priority to keep a watch out for any activity that would be a contributing factor of this concern. In the past there were also concerns over whether or not the high BOD and TSS readings obtained in the WWTP were the results of contamination from nearby methamphetamine laboratories dumping waste products into the collection system. A thorough investigation was completed around the year 2000 and no evidence was found to support the idea that a "meth lab" was responsible for the effluent conditions at the WWTP. Factors related to the collection system aren't responsible for the high BOD and TSS levels experienced in the WWTP. The high levels in the plant are due to the fact that the plant size is too small for the number of people it currently serves. *Id.* at pp. 6-9.

⁴¹⁸ EFIS Docket Number 42, *Motion in Limine of Stoddard County Sewer Company and R.D. Sewer Co., L.L.C. Private Joint Applicants with Suggestions*, filed August 11, 2008. See also EFIS Docket No. 50, *Quarterly Status Report of Stoddard County Sewer Company, Inc., and R.D. Sewer Co., L.L.C., Private Joint Applicants*, filed August 29, 2008.

⁴¹⁹ See Procedural History; Findings of Fact 1-8, 91-94; and Exhs. 6 and 7 as they relate to this section.

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each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

Section 386.020(48), RSMo, defines "sewer corporation" as including:

every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets.

Stoddard County and R. D. Sewer are "sewer corporations" and a "public utilities," as defined in Sections 386.020(48) and (42), and are subject to the jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

2. Application of Section 393.190

a. The Statute's General Application

Section 393.190.1 provides in pertinent part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. . . .⁴²⁰

Section 393.190.2 provides:

No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality; neither shall any street railroad corporation acquire the stock or bonds of any electrical corporation, unless, in either case, authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security, **no stock corporation of any description,**

⁴²⁰ Emphasis added.

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domestic or foreign, other than a gas corporation, electrical corporation, water corporation, ***sewer corporation*** or street railroad corporation, ***shall, without the consent of the commission, purchase or acquire, take or hold, more than ten percent of the total capital stock issued by*** any gas corporation, electrical corporation, water corporation or ***sewer corporation*** organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any gas corporation, electrical corporation, water corporation or sewer corporation may, with the consent of the commission, acquire and hold the remainder of the capital stock of such gas corporation, electrical corporation, water corporation or sewer corporation, or any portion thereof.⁴²¹

The Applicants seek Commission approval of the transfer of the following assets, as identified in paragraphs 42 and 43 of their Application, from Stoddard County to R. D. Sewer:

42. Stoddard County's assets include the following real estate:

Legal Description:

All of Lot 1 and the North 35 feet of Lot 2 in Block 1 of Ecology Acres Subdivision, as recorded in Plat Book 8 at Page 4 in the Recorder of Deeds Office of Stoddard County, Missouri.
Date of Acquisition: December 28, 1979.

43. Stoddard County's assets include the following personal property:

Description of Property

Sewer Plant Facility and Equipment

(One 15 h.p. Electric Motor, one 5 h .p . Blower Motor)

3-ABS 5 h .p. Grinder Pump, Rebuilt

8300 ft. of 3" PVC Sewer Main

11865 ft . of 8" PVC Sewer Main

One 1000 gallon three-axle Fiberglass Sewage Tank Trailer

One 16 ft., two-axle Flat Bed Trailer with Hydraulic Winch

One 20" x 30" Aluminum Extension Ladder

One Lot Rubber Air Up Test Plugs

Two 18 x 25 x 52 Four-Drawer File Cabinets

One Stand Light

⁴²¹ Emphasis added.

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The proposed transfer of assets involves Stoddard County selling, transferring, or otherwise disposing or encumbering the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, and as such, the transfer of Stoddard County's assets requires that the companies involved secure Commission authorization.⁴²² No party contests the facts that, to-date, no transfer of Stoddard County's assets has taken place and the transaction proposed requires Commission approval pursuant to Section 393.190. However, the record is clear that Stoddard County's corporate stock has already been assigned to R. D. Sewer.⁴²³

b. Section 393.190.2 – Not Applicable

Two days prior to the evidentiary hearing, Public Counsel filed a motion to dismiss this matter alleging the Commission lacked jurisdiction pursuant to Section 393.190.2, because it believed Mrs. Bien's assignment of Stoddard County's stock to R. D. Sewer was void. Because of the timing of this filing, the Commission took the motion with the case to allow the other parties an opportunity to fully respond. The Commission directed the parties to include their responses in their post-hearing briefs.

The gravamen of Public Counsel's claim is: (1) at the time the transfer of stock occurred from Stoddard County to R. D. Sewer, R. D. Sewer was not a "sewer corporation" as defined in Section 386.020; (2) at the time the transfer of stock R. D. Sewer was a "stock corporation" as referred to in Section 393.190.2; (3) R. D. Sewer received the transfer or assignment of Stoddard County's stock without Commission approval as required by Section 393.190.2 for stock corporations and; consequently, that transfer or assignment is void pursuant to Section 393.190.3; (4) because the transfer of stock is void, Mrs. Bien is still the legal owner of the stock; (5) the Commission cannot approve the transfer of Stoddard County's assets without the presence of the owner of Stoddard County's stock (i.e. Mrs. Bien is a necessary party), and (6) therefore, the Commission lacks jurisdiction to hear this case or approve the requested

⁴²² Section 393.190.1 (emphasis added).

⁴²³ Exh. 6, Assignment of Interest in Stoddard County Sewer, Inc., executed June 12, 2002; Exh. 7, Assignment of Interest in Stoddard County Sewer, Inc. and Assignment Order and Receipt, Estate Number 35P070000096, executed June 12, 2002.

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transfer of assets.⁴²⁴

Public Counsel's motion shall be denied for multiple reasons. The Commission has personal jurisdiction over Stoddard County and R. D. Sewer in this matter because, as previously noted, they are both presently sewer corporations and public utilities. Moreover, both companies acquiesced to the Commission's jurisdiction when they filed their application and entered their appearance, through counsel.

With regard to subject matter jurisdiction, as an initial matter, Section 393.190.2 does not apply to R. D. Sewer. It did not apply at the time of the purported transfer of Stoddard County's stock, and it does not apply now. Public Counsel is correct that at the time the assignment of stock agreement was executed, i.e. on or about June 11, 2002, R. D. Sewer was not a sewer corporation – it clearly became a sewer corporation before the ink dried on Mrs. Bien's signature on the assignment, but in the seconds prior to the assignment, R. D. Sewer was only a Limited Liability Company (L.L.C.) and not a sewer corporation. R. D. Sewer remains an L.L.C. (although now it is also a sewer corporation), and L.L.C.s are not "stock corporations" subject to the requirements of Section 393.190.2. An L.L.C. has membership interests, not stock.⁴²⁵ Indeed, an L.L.C. is not even allowed to use the words "corporation" or "incorporated" in its company name.⁴²⁶

The Commission is required, by Section 393.190.1, to approve any transfer of Stoddard County's assets and the Commission has an appropriate application before it seeking that approval. Even assuming, *arguendo*, that Section 393.190.2 was applicable and that the stock assignment was void, it is irrelevant who owns Stoddard County's stock for purposes of making a determination on the requested approval for the transfer of assets. Mr. Owens testified that he has an oral agreement with Mrs. Bien regarding the proposed transfer. The Commission has the jurisdiction and authority to approve the requested transfer in the absence of Mrs. Bien subject to any conditions the Commission may impose on such a transfer. One condition the Commission would require is for Stoddard County to file a fully executed transfer of assets agreement between the appropriate parties.⁴²⁷ If it approves the transfer,

⁴²⁴ EFIS Docket 44, Office of the Public Counsel's Motion to Dismiss for Lack of Jurisdiction, filed August 11, 2008. See also Transcript, pp. 17-18, 283-284

⁴²⁵ Sections 347.015(12), 347.081 and 347.097.

⁴²⁶ Section 347.020(2).

⁴²⁷ The Commission's filing requirements recognize that the authority to transfer assets of a sewer company require the filing of contract or agreement of sale; consequently, the may

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the Commission may also place other conditions on the transfer, and any of the parties to the proposed transfer, including Mrs. Bien, may elect not to proceed with the approved transfer if they do not wish to comply with the Commission's conditions.⁴²⁸

Even assuming, *arguendo* again, that Mrs. Bien was a necessary party because she still owned Stoddard County's stock, the absence of a necessary party is not fatal to jurisdiction.⁴²⁹ Rather, "[i]f it is claimed that necessary parties who are subject to the processes of the court are not present, the remedy is not by a motion to dismiss but rather by motion to add the parties deemed to be necessary."⁴³⁰ Dismissal is appropriate only if the court finds the absent party both "necessary" and "indispensable."⁴³¹ However, a person, group or entity can only be considered "indispensable" if that person, group or entity cannot be made a party and if the court determines that it cannot "in equity and good conscience" allow the action to proceed without him.⁴³² To determine whether in equity and good conscience the action should proceed among the parties before it, there are four factors to be considered: (1) prejudice to the absent party or to those already parties, (2) the lessening or avoiding of prejudice by protective provisions in the judgment, by shaping relief, or by other measures, (3) the adequacy of

grant conditional authority, requiring these requirements be met prior to fully authorizing the transfer. See Commission Rule 4 CSR 240-3.310. Moreover, the Commission's rule only requires filing a contract for sale and in this instance Mrs. Bien has promised to transfer the assets without charge.

⁴²⁸ See Case No. SO-2007-0071 (transfer of assets) and Case No. EM-2007-0374 (merger). It is common practice for the Commission to grant conditional authority for this type of requested relief.

⁴²⁹ *Bracey v. Monsanto, Co.*, 823 S.W.2d 946, 947 (Mo. banc 1992); *Edmunds v. Sigma Chapter of Alpha Kappa*, 87 S.W.3d 21, 27 (Mo. App. 2002); *Iowa Steel & Wire Co., Inc. v. Sheffield Steel Corp.*, 227 S.W.3d 549, 556 (Mo. App. 2007); *In the Matter of Sweeney*, 899 S.W.2d 886, 889 (Mo. App. 1995). "Failure to join a necessary party, however, is not ground for dismissal. Rule 52.06. There is a recognized distinction between an 'indispensable party,' without whose presence a case may not be maintained, and a 'necessary party,' who should be made a party in order that there may be a complete determination of the controversy at hand, but whose presence is not essential to a determination of the issues between the parties. If it is claimed that necessary parties who are subject to the processes of the court are not present, the remedy is not by a motion to dismiss but rather by motion to add the parties deemed to be necessary. Rules 52.06 and 55.27(a)(7)." *Bracey v. Monsanto Co., Inc.*, 823 S.W.2d 946, 947 (Mo. banc 1992).

⁴³⁰ *Bracey*, 823 S.W.2d at 947; *Edmunds*, 87 S.W.3d at 27 (Mo. App. 2002); *Iowa Steel*, 227 S.W.3d at 556.

⁴³¹ *Kingsley v. Burack*, 536 S.W.2d 7, 11 (Mo. banc 1976).

⁴³² *Id.*; *State ex rel. Webster County v. Hutcherson*, 199 S.W.3d 866, 874 (Mo. App. 2006); Rule 52.04.

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the judgment which might be entered in the person's absence, and (4) the adequacy of a remedy if the action is dismissed for nonjoinder.⁴³³

Public Counsel did not request the appropriate relief for its claimed deficiency because Mrs. Bien was not an indispensable party and Public Counsel did not seek her joinder. But even if Mrs. Bien was considered a necessary party, the Commission still has jurisdiction to proceed because any relief ordered will not prejudice Ms. Bien or any of the parties in any way. The Commission would not approve the transfer without a condition that Stoddard County file a properly executed transfer of assets agreement. This would require Mrs. Bien to be a party to the agreement, and that is the only "presence" of Mrs. Bien that would be required in this matter.

Public Counsel has requested the Commission dismiss this case on the basis of inapplicable statute, which even if applicable would be irrelevant, and that even if applicable and relevant (which Section 393.190.2 is not) the appropriate relief would not be dismissal. The Commission declines Public Counsel's invitation to act contrary to the applicable law.

3. Transfer of Assets Approval Standard – "Not Detrimental to the Public Interest"

Section 393.190 does not set forth a standard or test for the Commission's approval of the proposed transfer of assets. However, when reviewing Section 393.190's predecessor, i.e. Section 5195, RSMo 1929, the Missouri Supreme Court determined that the standard for Commission's approval of transactions pursuant to this statute is the "not detrimental to the public interest" standard.⁴³⁴ As the court explained:

The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as

⁴³³ *Burack*, 536 S.W.2d 7 at 11.

⁴³⁴ *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934). See also *State of Missouri ex rel. Ag Processing, Inc., v Public Service Commission of the State of Missouri and Aquila, Inc., f/k/a Utilicorp United, Inc.*, 2003 WL 1906385*6 (Mo. App. 2003) (overruled on other grounds).

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would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'⁴³⁵

No Missouri court has deviated from this ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190, and this standard is further cemented by the Commission's own rules, which require an applicant for such authority to state in its application "[t]he reason the proposed sale [or transfer] of the assets is not detrimental to the public interest."⁴³⁶

No party contests that the appropriate standard the Commission must apply to evaluate the proposed transaction, pursuant to the application of Section 393.190, is the "not detrimental to the public interest" standard, and "[t]he Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."⁴³⁷

The Missouri Court of Appeals has stated of Section 393.190: "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."⁴³⁸ "To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently."⁴³⁹

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that Stoddard County and R. D. Sewer provide safe and

⁴³⁵ *City of St. Louis*, 73 S.W.2d at 400.

⁴³⁶ Commission Rule 4 CSR 240-3.310(1)(D).

⁴³⁷ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

⁴³⁸ *Id.*

⁴³⁹ See *In the Matter of the Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2007-0071, et al, Report and Order issued February 8, 2007; *In Re the Matter of the Joint Petition of Frimel Water System, Inc. and Lake Lorraine Property Owners' Association for Authority for Frimel Water System, Inc., to Transfer Its Assets and Cease Operations*, Case No. WM-2006-0459 (Report and Order issued November 7, 2006, 2006 WL 3371567 (Mo. P.S.C.); See also *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C.3rd216, 220. See also *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

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adequate service to their customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the provision of sewer service less safe or less adequate, or which tends to make rates less just or less reasonable.⁴⁴⁰ The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits.⁴⁴¹ The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.⁴⁴²

4. Burden of Proof

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof, which carries with it a preponderance of the evidence.⁴⁴³ That burden does not shift. Thus, a failure of proof requires a finding against the applicant.⁴⁴⁴ Consequently, the Commission may not withhold its approval of the proposed transaction unless the Applicants fail in their burden to demonstrate that the transaction is not detrimental to the public interest, and detriment is determined by performing a balancing test where attendant benefits are weighed against direct or indirect effects of the transaction that would diminish the provision of safe or adequate of

⁴⁴⁰ *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108. See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ Report and Order, *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, issued October 6, 2004, effective October 16, 2004. See also Report and Order on Rehearing, issued February 10, 2005, effective February 20, 2005, reiterating the standard, 2005 WL 433375 (Mo.P.S.C.) *Re Union Electric Company, d/b/a AmerenUE*.

⁴⁴⁴ *Id.*

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service or that would tend to make rates less just or less reasonable.⁴⁴⁵

5. Public Interest Defined

While the standard for evaluating transactions proposed pursuant to Section 393.190 is clear, the term “public interest” must also be examined. “The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.”⁴⁴⁶ “[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.”⁴⁴⁷ The General Assembly of the State of Missouri many years ago, by enactment of the Public Service Commission Law (now Chapter 386), wisely concluded that the public interest would best be served by regulating public utilities.⁴⁴⁸ The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission’s authority.

The public interest is a matter of policy to be determined by the Commission.⁴⁴⁹ It is within the discretion of the Commission to determine when the evidence indicates the public interest would be served.⁴⁵⁰ Determining what is in the interest of the public is a balancing

⁴⁴⁵ *City of St. Louis*, 73 S.W.2d at 400; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980). See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

⁴⁴⁶ *In re Rahn’s Estate*, 291 S.W. 120, 123 (Mo. 1926).

⁴⁴⁷ *Morrishhead v. Railways Co.*, 96 S.W. 261, 271 (Mo. banc 1907).

⁴⁴⁸ *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974).

⁴⁴⁹ *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

⁴⁵⁰ *State ex rel. Intercon Gas, Inc. v. Public Service Com’n of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

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process.⁴⁵¹ In making such a determination, the total interests of the public served must be assessed.⁴⁵² This means that some of the public may suffer adverse consequences for the total public interest.⁴⁵³ Individual rights are subservient to the rights of the public.⁴⁵⁴ The “public interest” necessarily must include the interests of both the ratepaying public and the investing public. In fact, the Commission notes that the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property.⁴⁵⁵ However, as noted, the rights of individual groups are subservient to the rights of the public in general.

6. Standard for Granting an Interim Rate Increase

“The Public Service Commission has the power in a proper case to grant interim rate increases within the broad discretion implied from the file and suspend statutes and from the practical requirements of utility regulation.”⁴⁵⁶ Emergency conditions requiring especially speedy rate relief, exist ‘where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility’s ability to render adequate service or render it unable to maintain its financial integrity.’⁴⁵⁷

The Commission has previously set out standards for granting interim rate relief. To be eligible for interim rate relief a utility company must show: (1) that it needs the additional funds immediately, (2) that the

⁴⁵¹ *In the Matter of Sho-Me Power Electric Cooperative’s Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

⁴⁵⁵ In *State ex rel. City of St. Louis v. Public Service Com’n of Missouri*, 73 S.W.2d 393 (Mo. banc 1934), a case involving the sale of stock, and thus partial ownership, of two Missouri public utility corporations to a Virginia Corporation, the Missouri Supreme Court held: “The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to ownership of property. A property owner should be allowed to sell his property unless it would be detrimental to the public.” *Id.* at 400.

⁴⁵⁶ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 566-568 (Mo. App. 1976); *State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979); Sections 393.140(11) and 393.150.

⁴⁵⁷ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 568 - 569 (Mo. App. 1976).

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need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief.⁴⁵⁸ The Commission also has the power, on a case-by-case basis, to grant interim rate relief on a nonemergency basis where the Commission finds that particular circumstances necessitated such relief.⁴⁵⁹ The standard for granting interim relief on a nonemergency basis is good cause shown by the company, and determination of good cause shown is at the Commission's discretion.⁴⁶⁰

7. Final Conclusions Regarding Jurisdiction, Applicable Statutes, Burden of Proof, and Applicable Standards for Evaluating the Transfer Application and Interim Rate Increase Request

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) Stoddard County and R. D. Sewer are subject to the jurisdiction, control, and regulation of the Commission; (2) Stoddard County and R. D. Sewer have properly pled and requested all appropriate relief from the Commission with regard to their asset transfer application pursuant to Section 393.190 and the Commission's Rules; (3) the standard to apply to transfer of assets application is the "not detrimental to the public interest standard," and application of this standard is a balancing test as described in detail, *supra*; (4) determination of what constitutes the "public interest" is a matter of policy to be determined by the Commission; (5) Stoddard County and R. D. Sewer bear the burden of proof of satisfying the standard in order to gain approval of their proposed transfer of assets, and (6) the Commission may grant interim rate relief on an emergency basis or on a case-by-case basis for good cause shown.

⁴⁵⁸ *In the Matter of Timber Creek Sewer Company, Inc.'s Tariff Designed to Increase Rates for Sewer Service*, Case No. SR-2008-0080, Order Approving Small Company Rate Increase On An Interim Basis, Subject to Refund, and Approving Tariff, issued October 30, 2007, 2007 WL 3243348 (Mo.P.S.C.); *In re Missouri Public Service Company*, Case No. 18,502, 20 Mo. P.S.C. (N.S.) 244 (1975); *In re Missouri Power & Light Company*, Case Nos. GR-81-355 and ER-81-356 (1981); *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App. 1976); *State ex rel. Arkansas Power & Light Company v. Public Service Commission*, 736 S.W. 2d 457 (Mo. App. 1987).

⁴⁵⁹ *Id.* There is nothing to prohibit the Commission from authorizing interim rates. *State ex rel. GTE North, Inc. v. Missouri Public Service Com'n*, 835 S.W.2d 356, 368 (Mo. App. 1992).

⁴⁶⁰ *In the Matter of the Empire District Electric Company's Tariff Revision Designed to Increase Rates, on an Interim Basis and Subject to Refund, for Electric Services Provided to Customers in the Missouri Service Area of the Company*, Case No. ER-97-82, Report and Order, issued February 13, 1997, 1997 WL 280093 (Mo.P.S.C.)

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B. Purported Encumbrances on Stoddard County's Assets⁴⁶¹

In addition to governing the immediate application for the transfer of Stoddard County's assets to R. D. Sewer, Section 393.190.1 also requires Commission approval of any transaction that would encumber any part of Stoddard County's assets in any manner. Any security interest conveyed without Commission approval is void.

The documents identified by the parties, and delineated in the Findings of Fact Section of this order, that were executed by Carl Bien and purport to convey a security interest in Stoddard County's assets to Clinton Enterprises, Citizens Bank of Dexter, and Ed Maslansang were never approved or authorized by the Commission as is statutorily required in Section 393.190.1. Those attempts at conveyance are void. Moreover, there is no record evidence that the Commission has ever approved a secured interest in Stoddard County's assets to any person, group or entity.

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) the instruments executed by Carl Bien that purport to convey a security interest in Stoddard County's assets, as delineated in the Findings of Fact section of this order, are void and non-enforceable; and (2) any purported security interest in Stoddard County's assets that lacks Commission approval or authorization is void and non-enforceable.

C. Stoddard County's Cost Structure⁴⁶²

Determining Stoddard County's cost structure is a necessary prerequisite for the Commission to fully perform its balancing test when applying the not detrimental to the public interest test. Consequently, the Commission shall make that determination prior to rendering its conclusions on the proposed assets transfer and request for interim rate relief.

1. Methods for Calculating Revenue Requirements

The Commission determined in its findings of fact that the methodology employed by Bonadio, determining actual costs, without rounding figures, was the most accurate methodology to determine Stoddard County's current cost structure for purpose of determining an appropriate interim rate increase. Bonadio's analysis is current, as opposed to Staff's 2002 audit; it involved onsite inspections of the WWTP, coordination with the engineering report completed by Smith &

⁴⁶¹ Refer to Findings of Facts Numbers 95-101 for this section.

⁴⁶² Refer to Findings of Facts Numbers 102-351 for this section.

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Co., interviews with Mr. and Mrs. Owens (WWTP operators) and Bonadio utilized the company's actual invoices, thus eliminating any errors in the accounting that generated the company's Annual Reports.

Public Counsel employed a hodgepodge of methods. Public Counsel found it immaterial to examine or analyze certain line items of the company's cost structure; it utilized the company's 2007 Annual Report, adjusted for CPI for some line items; and it provided little to no explanation on how it derived other suggested line item allocations. Public Counsel even failed to fully consider one line item, the company's liability insurance. Public Counsel did not conduct an onsite inspection, did not interview the Owens and did not examine the actual invoices of the company.

Staff's 2002 audit is the only full audit of the company. Bonadio and Public Counsel performed limited reviews. Staff's audit, having not been updated, serves as a basis of comparison and verification for Bonadio's and Public Counsel's suggested allocations. And, as will be described in detail below, in at least one instance, i.e. billing expenses, it provides the best calculation for determining the proper expense allocation.

Stoddard County's proposed allocations to Bonadio are simply that, proposals. No accounting methodology has been described by the company to verify its suggested line item allocations. At best, Stoddard County's suggested cost structure can be used to compare and contrast the various suggestions of the party. The dramatic difference between what Stoddard County proposed to Bonadio and what Bonadio's suggested for the company's cost structure is more evidence of Bonadio's impartiality and neutrality in this matter.

2. Presumption of Prudence

While a utility has the burden of proof, there is initially a presumption that its expenditures are prudent. The Commission has previously cited the following description of this process as found to apply to the Federal Energy Regulatory Commission:

The Federal Power Act imposes on the Company the "burden of proof to show that the increased rate or charge is just and reasonable." Edison relies on Supreme Court precedent for the proposition that a utility's cost are [sic] presumed to be prudently incurred. However, the presumption does not survive "a showing of inefficiency or improvidence." As the Commission has explained, "utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . .

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However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.”⁴⁶³

The Commission has interpreted this process as follows:

“In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility’s management knew or should have known. In making this analysis, the Commission is mindful that “[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public.”⁴⁶⁴

While the parties have disputed individual line item allocation suggestions for Stoddard County’s cost structure, there is no evidence in this record that Stoddard County’s actual expenses were imprudently incurred.

3. Stoddard County’s Cost Structure - Line Item Allocations

a. Postage/Post Office Box

With no party in the current action claiming an expense associated with a post office box, the Commission can only assume that Stoddard County no longer maintains a post office box. Consequently, the evidence supports no expense in this regard for the purpose of calculating a revenue requirement to determine an appropriate interim rate increase.

b. Mowing, Miscellaneous Expenses, Real Estate Taxes, Annual Registration, PSC Assessment

⁴⁶³ *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

⁴⁶⁴ *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930).” *In the Matter of Missouri-American Water Company’s Tariff Sheets*, Report and Order, Case No. WR-2000-281 (August 31, 2000).

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Mowing

Stoddard County, R. D. Sewer, Bonadio and Public Counsel are all in agreement concerning the amount of the expenses that should be allocated for of mowing expense, miscellaneous expenses, real estate taxes, annual corporate registration, and the Commission's annual assessment. While the Commission has concluded that Bonadio's methodology is the most reliable, the fact that all three of these parties are in agreement with their calculations and suggestions serves to verify the accuracy of the suggested allocations. The Commission concludes there is substantial and competent evidence on the record as a whole to support the following allocations for Stoddard County's Cost structure: (1) \$750 for the company's annual mowing expense; (2) \$100 for the company's annual miscellaneous expenses; (3) \$230 for the company's annual real estate tax expense; (4) \$50 for the company's annual corporate registration expense; and (5) \$2,219 for the company's Commission assessment expense.

c. Billing Expenses

The Commission rejects Public Counsel's position that nothing should be allowed for billing expense and that this expense, without quantification, should just be considered to be part of the operator's expense. In addition to the time and personnel elements involved with billing and maintaining customer accounts, there are actual expenses associated with the use of monthly bills/cards, or payment books, mailing bills and with attempts to collect late-payments.

The Commission further concludes, that for purposes of determining Stoddard County's cost structure that Stoddard County's and Bonadio's recommendations for the allocation for total billing expenses is not supported by substantial evidence in the record. There is simply not enough information in this record to support these recommendations.

In this instance, the Commission concludes that using Staff's per billing expense from 2002 is the best method for determining this allocation for Stoddard County's cost structure. Staff's method resulted from the preparation of a full audit, while Public Counsel and Bonadio conducted limited reviews. The number of customers served by Stoddard County has not changed since 2002 and expenses of billing have, without doubt, increased since 2002.⁴⁶⁵ Utilizing Staff's method will prevent over-estimating actual expenses and more accurately reflect

⁴⁶⁵ Postage alone has increased in this time period, and no party has adduced evidence of decreasing expenses.

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the time, personnel and cost of materials actually expended with billing Stoddard County's customers pending the completion of a formal small company rate increase case.

Stoddard County serves 172 customers; however, 51 of those customer bills are paid by one entity, Maco property management company. Consequently, Mr. Owens, if allowed to bill monthly, would be required, at minimum, to mail 122 bills utilizing a monthly billing system or 1462 bills annually. Applying Staff's \$1.55 calculated expense for each bill from its 2002 audit (an expense that has most probably increased since 2002) results in an annual billing expense of \$2269.20. Because Mr. Owens is going to be required to file a formal small company rate increase case within thirty days of this order, and because there is a nine month deadline for completing such cases, should the Commission authorize an interim rate increase for Stoddard County, Mr. Owens will undoubtedly recover less than what the cost structure utilizing this allocation would allow. To build in a margin to correct for any possible error with this allocation, the Commission will authorize ten months of billing expenses at this rate to be included in the company's revenue requirement should it authorize an interim rate increase. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's billing expense is \$1891.

Mr. Owens testified that he obtained better collections from his customers when he billed with monthly cards, but that the current tariffs for the company restrict him to the use of payment books. Should the Commission authorize an interim rate increase in this case or if it should authorize a rate increase in a subsequent case, the Commission will direct Mr. Owens to submit revised tariffs including a provision establishing monthly billing. This will improve Mr. Owens cash flow to allow for better operation and maintenance of the WWTP. Any new tariff submissions the Commission direct shall also instruct Mr. Owens to include a provision for collection of fees for late-payment of bills, another item that is presently missing from Stoddard County's tariffs, the lack of which encourages customers to default on timely payments.

d. Operator Expense

Mr. Owens, an experienced operator of three water companies in addition to operating Stoddard County testified that operating a sewer company is more intensive than operating a water company. In order to operate and maintain Stoddard County, Mr. Owens works on the WWTP,

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on average, two to three hours per day, seven days a week or a total of 728 to 1092 hours annually. He is essentially on-call for repairs 24 hours a day, 7 days a week to keep this system operational. He also provides labor and services to other individuals in order to obtain their labor and services to keep the WWTP operational. The engineering report, describing the poor condition of the WWTP substantiates Mr. Owens' testimony regarding how much labor is involved to maintain the system. The current earnings from the plant generated him a wage ranging between 21 cents to \$1.59 per hour for all of his labor.

Bonadio attempted to make a comparison of operator salary costs for similar sized regulated utilities operating in southeast Missouri and was unable to make a full comparison because Stoddard County's mechanical system, and the size of its system, made it not easily comparable to other systems. Bonadio, examining publicly available information from other Commission water and sewer rate cases, developed a range for operators' fees and chose the higher end of that scale for its recommendation allocation of \$13,800. Similarly, Staff's full audit from 2002 determined that the appropriate operator expense should be \$13,000, and because it is doubtful an appropriate fee would decrease since 2002, the Commission concludes that Staff's calculation serves to verify Bonadio's.

Public Counsel, utilizing the same information as Bonadio along with one other Commission case, produced a recommendation for the operator's expense to be \$8,749. It is clear from the record; however, that Public Counsel's witness: (1) has no actual experience with operating a WWTP; (2) did not perform an on-site inspection of the facility; (3) did not know what type of systems were involved in the prior Commission cases to compare their operations to Stoddard County's operations; (4) did not know if the operator expenses he reviewed from the prior cases involving combination water and sewer companies for both portions of the operations; (5) was unfamiliar with testing requirements for sewer systems; and, (6) did not provide the Commission with any of the salary or market studies upon which he allegedly based his recommendation.

Public Counsel claims it is difficult to calculate an appropriate hourly wage for operators of sewer companies, but Staff correctly notes in its brief, that accepting Public Counsel's recommendation that operator expense be set at \$8,749 annually would allow Mr. Owens a wage for operating the WWTP ranging between \$8 to \$12 per hour.

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Utilizing Staff's recommendation of \$13,000 from the 2002 audit⁴⁶⁶ would produce a wage ranging between approximately \$12 and \$18 per hour. Using Bonadio's recommendation of \$13,800 would produce a wage for the operator ranging between approximately \$12.50 and \$19 per hour.

The average number of hours per year worked by Mr. Owens at Stoddard County is approximately 910 hours. However, the Commission concludes that using only this average would not adequately reflect the number of hours Mr. Owens contributes to operating the system, especially given the extensive maintenance and repairs that demand his time and attention and the fact that he must barter additional labor hours in order to secure additional labor for maintaining the plant. Consequently, the Commission concludes that to more accurately capture an approximate total of Mr. Owens' labor it must add in a load factor. The Commission concludes that adding an additional 10% of the lowest annual projection of the hours Mr. Owens works is the appropriate amount of additional hours to factor into the wage determination. Thus, adding 73 hours to the average 910 hours in labor produces a total of approximately 983 annual hours of labor. The Commission concludes that, for purposes of determining the company's current cost structure for this case, 983 annual hours, which falls significantly below the maximum estimate of 1092 annual hours, is the appropriate number of annual labor hours to use for determining the operators' fee.

While the record supports a determination that Bonadio's methodology and calculation for operator's salary is superior to Public Counsel's, to prevent over-estimating the appropriate wage, the Commission will average the wage ranges provided by Public Counsel, Bonadio and Staff. This average produces an average hourly wage of approximately \$13.50 per hour. To further ensure the Commission is not drifting too high in its determination, it will use a lower value of \$13 per hour, factoring out the highest recommendation from Bonadio. Multiplying a wage of \$13 per hour times a total of 983 annual labor hours results in an annual wage of approximately \$12,799 per year.

The Commission would note that this calculated wage is in line with Bonadio's calculations and recommendations (\$13,800) and is also in line with Staff's 2002 audit (\$13,000). This comparison serves to verify the reasonableness of the calculation, and the Commission does not

⁴⁶⁶ As previously noted, Staff combined \$2000 from billing expenses in its recommended salary of \$15,000, and because the Commission has kept that expense as a separate line item, it bases this calculation on \$15,000 minus the \$2000 in personnel and labor included from billing expenses. See Finding Facts Numbers 152 and 172.

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believe that labor costs will have dropped since Staff performed its full audit in 2002.

While using Public Counsel's suggestion to produce an average that errs on the low side of the scales, the Commission emphasizes that Public Counsel's calculation, for the reasons stated above, is flawed and the Commission assigns it less weight and credibility than the suggestions from Bonadio or Staff. Because it is flawed, the Commission concludes that Public Counsel's recommendation of \$8,749 is too inaccurate to use it as a comparison for verifying the Commission's final calculation. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's operator expense is \$12,799.

e. Office Supplies

Stoddard County's 2007 Annual Report lists Supplies and Expenses as being \$3,508.26. Bonadio calculated Stoddard County's actual office supply expense as being \$3,065 based upon interviews with Mr. and Mrs. Owens and from the company's documents, and then rounded his actual value up to \$3,100. Public Counsel, who claimed they were relying on the 2007 Annual Report, produced a figure of \$1,340. Staff's 2002 audit only reflected an office supply expense of \$180.

Clearly, Stoddard County's day-to-day operational expenses have not decreased since 2002. Staff's witness testified accordingly. And despite Public Counsel's claim to have relied upon the company's Annual Report, there is an obvious discrepancy between Public Counsel's recommendation for this allocation versus what is included in the 2007 Annual Report, a discrepancy that Mr. Robertson, Public Counsel's witness, did not explain at hearing. Nor is the Commission convinced that it is proper to round up all expense figures, as was done by Bonadio, even if this is a common accounting practice.

Bonadio produced an actual cost figure of \$3,065, verified by analyzing Stoddard County's invoices. The Commission finds Bonadio's actual cost calculation without roundup to be the most accurate and concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's for office supplies is \$3,065.

f. Effluent Testing

Bonadio based its calculation of the expense for effluent testing

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directly on the notice sent to Stoddard County from the company that the company contracts to perform the service. Public Counsel extrapolated their calculation by utilizing the expense reported the company's 2007 Annual Report and factoring in an adjustment for CPI. These amounts only varied by \$11.

Staff's 2002 audit reflects a combined expense for Testing and Supplies of \$1,703. The Commission concludes, however, that Staff's audit with regard to this expense is too outdated to reflect current actual costs for determining Stoddard County's current cost structure.

The Commission concludes that the actual notice from the company performing the effluent testing is the most accurate measure of Stoddard County's expense for this testing. Consequently, the Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's effluent testing expense is \$1,252.

g. Repairs and Maintenance

There is overwhelming evidence in the record that the condition of Stoddard County's WWTP is in decline, requires continual and extensive maintenance, needs significant upgrading and improvement, and lacks necessary back-up equipment. The company's 2006 and 2007 Annual Reports reflect an average annual repair and maintenance expense of approximately \$2,000. Smith & Co. recommended an annual allocation of \$2,400 for this expense based upon information provided to it by Mr. Owens and obviously based upon its extensive knowledge of the cost of materials and equipment required to operate a WWTP. Bonadio, in turn, relied upon Smith and Co. when it recommended \$2,400 in repair and maintenance expense.

Public Counsel, on the other hand, examined only the 2007 Annual Report, and refused to acknowledge the company's current operating condition. Public Counsel did not conduct an on-site inspection of the WWTP and provided no controverting evidence to the Preliminary Engineering Report completed by Smith & Co., a report that documents significant repair and maintenance issues. These repair and maintenance issues are further documented by the WWTP's extensive environmental problems reported by the DNR. Public Counsel also failed to factor in the projected continual need for repairs as was testified to by Mr. Merciel.

The Commission concludes that the substantial and competent evidence on the record as a whole supports Smith & Co.'s and Bonadio's

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recommendation that \$2,400 be allocated for repairs and maintenance. The Commission concludes that the correct amount to be allocated in Stoddard County's current cost structure for repairs and maintenance is \$2,400.

h. Rent

Bonadio determined that Stoddard County's share of the rent expenses of all of the companies Mr. Owens operates should be \$1,050. Public Counsel concurred with Bonadio's analysis. The allocation for rent included in Staff's 2002 audit is outdated and inaccurate. Mr. Owens believes this estimate fails to capture one other small office that he utilizes; however, Mr. Owens provided no accounting of expenses associated with that office to support adjusting the \$1,050 recommendation agreed to by the other parties.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for rent is \$1,050.

i. DNR Annual Operating Permit Fee

The record evidence establishes that Stoddard County is currently permitted for operating a WWTP with a design capacity of 25,000 gallon per day and the proper DNR permit fee for that capacity is \$2,500. The actual total of gallons per day being treated by the WWTP or discharged in its effluent is irrelevant in that the permitted design capacity controls the cost of the permit.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for its DNR operating permit fee is \$2,500.

j. Utilities

Bonadio has provided the Commission with an actual cost figures of \$8,236 for utility expenses based upon an actual review of Stoddard County's invoices. Bonadio's rounded-up figure of \$8,500 artificially inflates the expense. The fact that Public Counsel's projection is only \$17 less than the actual costs incurred (\$8,219) confirms the reasonableness of these expenses and the Commission concludes that utilizing the actual cost figure, as opposed to Public Counsel's projected cost is more accurate in this instance.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost

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structure for its utility expenses is \$8,236.

k. Telecommunications

Bonadio determined that the combined actual, annual telecommunications expenses for all of Mr. Owens' water and sewer companies was \$3,333. These expenses included essential Internet expenses and negligible cable expenses. The phone expenses were billed to the companies as flat fees and not minute-by-minute purchases. Consequently, any personal use of the phones is irrelevant to the total expense. Bonadio recommended the shared expenses be apportioned accordingly with Stoddard County's share being \$834.

Public Counsel did not provide an explanation of how it determined its \$309 recommended allocation of for this expense. Lacking any foundation in any methodology to compare its recommendation to the actual telecommunications costs, Public Counsel's recommendation does not rise to the level of being considered as controverting evidence to Bonadio's analysis.

Staff's 2002 audit reflects that Stoddard County's telecommunications expenses were \$860. This determination, while outdated, serves as a check on Bonadio's calculations. While the Commission does not believe the day-to-day operations expenses of Stoddard County have decreased, increased competition in the telecommunications market and sharing these expenses between four separate companies could account for the decrease in this expense. Moreover, as the Commission has done with each of the individual cost allocations for Stoddard County's cost structure, the Commission would prefer to err on the conservative side when rendering its determination until a current full audit of the company is conducted in association with a formal small company rate case.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for its telecommunications expense is \$834.

I. Sludge Hauling

There is overwhelming evidence in the record that Stoddard County's WWTP is not adequately being cleared of sludge. This is evidenced by sludge build-up in the system itself and in the effluent from the WWTP. Smith & Co. inspected the facilities, performed a very exact calculation of the amount of sludge produced annually by the WWTP and compared its determinations, and the expenses required to adequately dispose of that sludge, with other Missouri regulated utilities.

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Bonadio relied upon Smith & Co.'s analysis to determine its proposed allocation for expenses for sludge hauling. Public Counsel, on the other hand, attempted to extrapolate a value for this expense based upon what was spent by the company in 2007 for sludge removal, not for what is actually required to properly operate and maintain the WWTP.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for sludge hauling expense is \$1,800.

m. Uncollectibles

Bonadio reviewed Stoddard County's history of uncollectible expenses and discovered the company's Annual Reports had erroneously overstated these expenses by reporting the cumulative balance for these expenses. Bonadio determined an appropriate estimate based upon Stoddard County's actual experience, an experience that is individual to this company. Comparisons of Stoddard County to other Missouri utilities would not be indicative of Stoddard County's experience and not serve as an appropriate means for comparison or verification.

Public Counsel did not provide an explanation of how it derived its \$303 recommended allocation of for this expense. Lacking any foundation in any methodology to compare its recommendation to Bonadio's estimate that was based upon the company's history of bad debts, the Commission concludes that Public Counsel's recommendation does not rise to the level of being considered as controverting evidence to Bonadio's analysis.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for uncollectible expenses is \$500.

n. Insurance

After examining the company's insurance policies, Bonadio determined that the insurance expenses for one company vehicle should be \$415. Bonadio then rounded that amount up to \$490 in its Report.⁴⁶⁷ Bonadio also determined that company documentation supported an expense of \$1,011 for liability insurance for the WWTP.

Public Counsel recommended \$591 for one company vehicle,

⁴⁶⁷ Mr. Shepard, testifying for Bonadio, stated that he had rounded this amount up to \$500, but \$490 is the amount reflected in Bonadio's report.

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extrapolating up from the amount listed in the company's 2007 Annual Report. Public Counsel did not address the issue of liability insurance for the WWTP and provided no recommendation for this part of the company's insurance expenses.

Bonadio's recommendation was based upon a review of the actual insurance policies, the actual expense of those policies, and isolating one company vehicles from those policies. Consequently, the Commission finds that the \$415 actual cost figure is more accurate and reliable than Bonadio's rounded-up figure or Public Counsel's extrapolated figure. Because the only evidence in the record for liability insurance is an annual expense of \$1,011, the Commission accepts this uncontroverted amount as being the only accurate and reliable information to establish that expense.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for insurance expenses, both automobile and liability, is \$1,426.

o. Legal and Professional

The Commission has reviewed all of the parties analyses and suggestions for legal and professional expenses and finds them all to be inadequately supported and incomplete. Public Counsel based its recommended allocation solely on the cost of tax preparation, i.e. \$584. Public Counsel factored in no legal expenses, and Bonadio, while noting Stoddard County's accounting services were inadequate appears to have only factored in a recommended increase base solely on that deficiency. Neither of these analyses conform adequately account for the evidence of the expenses Stoddard County is incurring in this category.

Stoddard County and R. D. Sewer require legal representation when they appear before the Commission and in all legal matters that require an "appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies." ⁴⁶⁸ Stoddard County incurred, at minimum, the costs of 16.25 hours of legal representation in this matter alone (the hearing time and at least one hour per pleading – clearly an

⁴⁶⁸ Section 484.010. See also Section 484.020 and Commission Rule 4 CSR 240-2.040.

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underestimate). Stoddard County is receiving representation in its negotiations with DNR. Stoddard County will require legal representation in the future rate case the Commission will mandate in this very order.

As a reference, the Commission will apply the statutory minimum of \$75/ hour for administrative cases where a party prevails against the agency to the low estimate of hours involved in this action.⁴⁶⁹ That calculation (16.25 hours at a rate of \$75 per hour) yields legal fees of approximately \$1,219. Additionally, Missouri courts have routinely sanctioned attorney's fees ranging from \$75 to \$200 per hour.⁴⁷⁰ Consequently, the average of the legislatively and judicially sanctioned hourly rates is \$137.50 per hour.⁴⁷¹ At the average rate sanctioned by the legislature and the courts, Stoddard County will have incurred, at minimum, \$2,234 dollars in legal fees for prosecuting this case.

Stoddard County already has a debt of approximately \$2,617 owed to the Holden Law Firm. Spreading costs of \$4,851 in legal fees (\$2,234 plus \$2,617) out over a three-year time period, without factoring in the additional legal fees that are forthcoming, would produce an annual average of approximately \$1,617.

Bonadio has indicated that Stoddard County is going to require better accounting services at increased cost and recommends an increase of \$408 annually for this expense, bringing their total recommendation to \$1000 for annual accounting expenses. Averaging Bonadio's and Public Counsel's recommendation yields an approximate amount of \$790 and added to the average of \$1,617 for legal fees results in a total of \$2,407.

The Commission realizes these amounts are estimates, but believes the record supports these estimates and they are on the lower

⁴⁶⁹ Section 536.087.

⁴⁷⁰ *In re C.W.*, 257 S.W.3d 155, 158 (Mo. App. 2008); *Wallace v. Wallace*, 2008 WL 4402435, 9 (Mo. App. 2008) ; *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334 (Mo. App. 2006); *Washington v. Jones*, 154 S.W.3d 346, 352 (Mo. App. 2004); *H.S.H. ex rel. R.A.H. v. C.M.M.*, 60 S.W.3d 656, 659 (Mo. App. 2001); *McIntosh v. McIntosh*, 41 S.W.3d 60, 73 (Mo. App. 2001); *Dildine v. Frichtel*, 890 S.W.2d 683, 687 (Mo. App. 1994); *American Bank of Princeton v. Stiles*, 731 S.W.2d 332 (Mo. App. 1987).

⁴⁷¹ Missouri Courts have also recognized that administrative agencies, legislatively authorized to award attorney's fees are granted the same discretion of that of a trial court. "The language of the statute mirrors established judicial principles in the award of litigation expenses. That is, the determination of reasonable litigation expenses is a matter within the sound discretion of the trial court. Furthermore, the trial judge is considered to be an expert on the matter of the reasonable value of legal services rendered and his determination will not be disturbed in the absence of a clear showing of manifest abuse of discretion." *Colony-Lobster Pot Corp. v. Director of Revenue*, 770 S.W.2d 705, 708 (Mo. App. 1989).

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end of the scale.⁴⁷² To ensure against over-inflating the allocation for this expense in the interim between this case and the formal rate case that will be ordered by the Commission, the Commission will round this estimate down to an even lower amount. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's annual legal and professional expenses is \$2,000.

p. Depreciation Expense and Return on Investment

To the extent Mr. Owens contributed more to the WWTP than has been depreciated in the past six years since he began operating the plant the rate base of the WWTP would increase and he would be allowed a return and depreciation on that amount. The evidence establishes that Mr. Owens contributed at least \$17,388 to the plant in the past three years. Because he has been operating with a revenue deficit he has not earned an appropriate rate of return on that investment. It is also difficult to discern what amounts, if any, have been depreciated from his contributions to plant and the record is not clear with regard to how much of the investment was contributed in the various category of depreciation percentage that the Commission routinely approves. Consequently, the Commission will allow Stoddard County to include a return on investment in the company's cost structure in the interim between this case and the completion of the formal small company rate case to follow this case. Not being able to positively identify the amounts and proper categories for depreciation, i.e. structures and improvement, collection, electric pumping and treatment and disposal facilities, the Applicants have failed in their burden to proof to the Commission that an amount for depreciation should be included in the company's current cost structure.

The record reflects that in recent prior small water and sewer company rate case, the Commission has approved rates of return ranging between 8.88% and 10.09%. Additionally, Mr. Merciel, one of Staff subject matter experts, informed Bonadio that a 11% rate of return

⁴⁷² While it is not part of the record in this case, the Commission notes that it is common knowledge that the average charge in the state of Missouri for one billable hour of an attorney in private practice is \$270. See *Who Bills What: Missouri Lawyers Weekly's First Billable-Hour Rate Listing*, Dolan Media Company Newswire Story, March 24, 2008. Also, the hourly attorney's charge for trial work ranged from \$126 to \$200 for 89% of attorneys responding to the Missouri Bar's 2007 Economic Survey. The charge was over \$300 per hour for 11% of the attorneys responding. See Missouri Bar Economic Survey 2007.

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would be appropriate for a company similar to Stoddard County. The average of the range between 8.88% and 11% is 9.94%. Mr. Owens has contributed at least \$17,388 to the WWTP and the commission shall allow him to recover a return on his investment of 9.94%. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's return on investment is \$1,728.

q. Total Cost of Service

The parties are all in agreement that Stoddard County's normalized operating revenues are \$21,970. There is no evidence in the record to controvert this fact. The Commission concludes that the substantial and credible evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's total cost of service is \$21,970.

r. Net Revenue Requirement

Having made its findings and conclusions regarding the appropriate line item expense allocations for Stoddard County's current cost structure, Commission concludes that the substantial and credible evidence on the record as a whole supports the determination that Stoddard County's total cost of service is \$44,830; its total revenue is \$21,970; and its net revenue deficit is \$22,860.

4. Final Conclusions Regarding Stoddard County's Cost Structure

Substantial and competent evidence in the record as a whole supports the conclusion that Stoddard County's current cost structure, as compared to recommendations of the parties, is as follows:

Recommendations	Stoddard County	OPC	Bonadio	Staff's 2002 Audit	Commission
Description					
Postage					
Post office Box	\$0	\$0	\$0	\$55	\$0
Payroll/Services					
Billing Expense	\$9,600	\$0	\$4,160	\$1,200	\$1,891
Operator Expense	\$24,000	\$8,749	\$13,800	\$15,000	\$12,799
Mowing	\$750	\$750	\$750	\$400	\$750

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<u>Miscellaneous</u>							
Misc.	\$100	\$100	\$100	\$0	\$100		
Office Supplies	\$3,508	\$1,340	\$3,100	\$180	\$3,065		
Effluent Testing	\$1,252	\$1,241	\$1,252	\$1,703	\$1,252		
Repair & Maint.	\$0	\$1,012	\$2,400	\$743	\$2,400		
Real Estate Taxes	\$230	\$230	\$230	\$163	\$230		
Depreciation	\$5,400	\$0	\$5,400	\$4,150	\$0		
Rent	\$4,200	\$1,050	\$1,050	0	\$1,050		
<u>Assessments/Permits</u>							
Annual	\$50	\$50	\$50	\$50	\$50		
Registration	\$3,000	\$2,500	\$3,000	\$3,000	\$2,500		
DNR Ann Op	\$2,219	\$2,219	\$2,219	\$1,449	\$2,219		
Permit							
PSC Assessment							
<u>Utility Expense</u>							
Utilities	\$8,500	\$8,219	\$8,500	\$9,484	\$8,236		
Telecommunications	\$3,060	\$309	\$834	\$860	\$834		
<u>Other Expense</u>							
Sludge Hauling	\$3,800	\$446	\$1,800	\$0	\$1,800		
Uncollectibles	\$500	\$330	\$500	\$0	\$500		
Insurance	\$1,499	\$591	\$1,501	\$0	\$1,426		
Legal & Professional	\$3,600	\$584	\$1,000	\$0	\$2,000		
Total Expenses	\$75,268	\$29,720	\$51,646	\$38,437	\$43,102		
Return on Investment	\$7,021	\$0	\$7,021	\$9,637	\$1,728		
Total Cost of Service	\$82,289	\$29,720	\$58,667	\$48,074	\$44,830		
Total Revenues	\$21,970	\$21,970	\$21,970	\$22,093	\$21,970		
Net Revenue Deficit	\$60,319	\$7,750	\$36,697	\$25,981	\$22,860		

If the Commission determines that it will approve the transfer of assets when it performs its balancing test (in a later section in this Report and Order), the Commission will determine if it shall authorize an interim rate increase based upon this cost structure.

D. The Provision of Safe and Adequate Service⁴⁷³

1. Relevant Commission Rule

Commission Rule 4 CSR 240-60.020 provides, in pertinent part:

(1) Each sewer utility shall maintain and operate a sewage

⁴⁷³ Refer to Findings of Facts Numbers 352-371 for this section.

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treatment facility of adequate capacity and properly equipped to treat the sewage and discharge effluent of the quality required by the laws of the state of Missouri and in other respects shall comply with the laws and regulations of the state and local health authority.

(2) The design and construction of a utility's system of sewers, treatment facility and all additions and modifications shall conform to the requirements prescribed by law except that any rule contained in this chapter shall apply which is more stringent than those prescribed by the Clean Water Commission.

(3) The sewer utility shall make reasonable efforts to eliminate or prevent the entry of surface or ground water into its sanitary sewer system. It may request assistance from the appropriate state, county or municipal authorities, but such a request does not relieve the sewer utility of its responsibility to prevent the entry of such surface or ground water.

2. Stoddard County's Service Quality Issues

While there have been no complaints raised by Stoddard County's customers with regard to the provision of sewer service or with the company's billing practices, it would appear that Stoddard County is in violation of Commission Rule 4 CSR 240-60.020 for exceeding the system's design capacity, failure to comply with environmental and health regulations, and failure to control the surface and ground water that drains into its system.⁴⁷⁴ Also, because 4 CSR 240-60.020(1) and (2) requires Stoddard County to maintain compliance with all other pertinent Missouri laws that govern the operation of its system, each violation of DNR regulations is also a violation of the Commission's rules.

It would appear that Stoddard County is providing adequate service in that its customers are receiving service, although the long-term provision of that service is in jeopardy without implementing improvements to the system. However, there are issues with the provision of safe service as are reflected by the company's environment problems.

The Commission acknowledges that Stoddard County is engaged in ongoing negotiations with DNR to resolve its compliance issues. Indeed, Mr. Owens still timely files his DNR reports, even though his MSOP has expired, and it is clear to the Commission that Mr. Owens is doing his best to bring the system into compliance. The Commission also recognizes that much of what has contributed to the problems

⁴⁷⁴ See Findings of Fact Numbers 94(n), 94(o), 233-236; Transcript, pp. 151-152.

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Stoddard County is experiencing is directly related to the age of the system and being unable to generate sufficient revenue to properly maintain the system.

Given the circumstances of this case, the Commission shall defer any determination with regard to whether Stoddard County is in violation of its rules until such time that the company has had an adequate opportunity, with adequate funds, to address the repair and maintenance problems the company is facing. The Commission shall require the company to file semi-annual compliance reports with the Commission delineating the steps it is taking to resolve the repair, maintenance and effluent problems that have been documented in this case. The Commission's Staff shall be ordered to perform annual inspections and file annual reports regarding the status of the company's compliance with the Commission's rules.

E. Application of the "Not Detrimental to the Public Interest" Standard⁴⁷⁵

Stoddard County is operating under a rate structure established in 1979 and has been substantially under-earning rendering it unable to properly repair and maintain the system. The fact that the company is having extreme difficulty maintaining the system jeopardizes its customers because it threatens the company's ability to maintain the provision of safe and adequate service. Indeed, while Stoddard County's customers may be receiving adequate sewer service in the sense that the system is currently functional, the disrepair and degradation of the system, along with lack of any back-up equipment, places those customers at risk of losing service for an extended length of time on a minute-by-minute basis. DNR's many compliance citations also indicate that the service being provided is not safe service and could constitute a threat to the public health.

The substantial and competent evidence on the record as a whole demonstrates that granting the Applicants' transfer of assets request will restore the facility's corporate status and will allow the company to seek the monetary return it should be earning. This in turn will promote better operation and management of the facility by allowing the current operator to properly repair and maintain the system. Proper operation will eliminate the risk to the public health.

The company's current cost structure quantifies the known revenue deficit, and no other entity is interested in repairing or operating the

⁴⁷⁵ See Findings of Fact 1-371 for this section.

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WWTP. Approving the Applicants' request for interim rate increase is appropriate under both applicable legal standards. The interim rate case is needed on an emergency basis to ensure the safe and adequate provision of service at just and reasonable rates. The funds are needed immediately, the need cannot be postponed further and no other alternatives exist to meet the need but rate relief. Additionally, good cause exists to grant the request; that cause being the deterioration and degradation of the WWTP that threatens the provision of safe and adequate service. Moreover, because the interim rate relief will be granted subject to refund, the ratepayers will be protected from any possible overcharge that could occur during the interim between implementing those rates and completing the formal small company rate case that will be mandated in this order.⁴⁷⁶

Performing its required balancing test, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusions that: (1) operational benefits, improved and stabilized customer service and improved public health safety will all result from approving the proposed transfer ; (2) because in addition to granting the transfer the Applicants will be allowed to implement interim rate relief, Stoddard County will be able to immediately begin the process of improving its service and eliminating potential threats to the environment; (3) because the Commission will condition approval of interim rate relief so that it is subject to refund, the ratepayers will be protected from any possible over-charge; (4) because the Commission has found the purported security interests that Mr. Bien attempted to convey without Commission approval are void, Stoddard County's assets are not jeopardized by any lingering claims from the parties to those defective instruments; and (5) because the Commission will direct its Staff to provide additional oversight of the company, the Commission can ensure that Stoddard County will continue to provide safe and adequate services at just and reasonable rates.

All of these conclusions weigh in favor of approving the transfer of assets. The Commission concludes that there is no competent or credible evidence in the record to support a conclusion that anything would directly or indirectly make Stoddard County's sewer service less safe or less adequate, or would tend to make rates less just or less reasonable by approving the requested transfer and interim rate relief

⁴⁷⁶ While Public Counsel has expressed concerns about refunds actually being achievable, the Commission can, in the alternative to requiring cash refunds, direct that credits be provided to customers in the event of over-earning.

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with the conditions that it plans to impose upon the transfer. In fact, the contrary is true. Approving the transfer will promote the provision of safe and adequate services at just and reasonable rates. There is no detriment to the public interest associated with approving the transfer and the requested interim rate relief.

The Commission further concludes the Applicants met their burden of establishing that there is no detriment to the public interest if the Commission authorizes the proposed transfer. The Commission shall authorize the proposed transfer subject to the conditions already contemplated and will consider other potential conditions in other sections of this Report and Order.

F. Additional Conditions for Approval of the Transfer of Assets

1. Recording Order Concluding Security Interests Are

Void

The Commission shall issue a separate companion order to this case concluding the security interests addressed in the body of this order are void pursuant to Section 393.190.1. The Commission shall require, as a condition of approval of the transfer of assets, R. D. Sewer to file a certified copy of said order with the Stoddard County Recorder and the Secretary of State.

2. Future Rate Case Filings

The Applicants agreed that should the Commission approve the requested transfer of assets and provide interim rate relief, that R. D. Sewer would file a formal small sewer company rate increase request pursuant to the applicable Commission rules within thirty days of the effective date of the Commission's order granting the relief requested in their application. The Commission shall so order; however, the Commission shall further require R. D. Sewer to file a subsequent small company rate increase request no later than three years following the effective date of this order. The subsequent case will hopefully capture any additional contributions made to the WWTP from any upgrades and improvements made to the system and will ensure that R. D. Sewer is providing safe and adequate service at just and reasonable rates.

G. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.⁴⁷⁷ The legislature cannot create a tribunal and invest it with judicial power or convert an

⁴⁷⁷ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

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administrative agency into a court by the grant of a power the constitution reserves to the judiciary.⁴⁷⁸

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.⁴⁷⁹ “Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”⁴⁸⁰ The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.⁴⁸¹ “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”⁴⁸²

⁴⁷⁸ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

⁴⁷⁹ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 - 173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

⁴⁸⁰ *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

⁴⁸¹ *Id.*

⁴⁸² *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

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The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties.⁴⁸³ Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decisions.

The Commission concludes that the Applicants have met their burden of proof and the transaction proposed by the Applicants, as conditioned by the Commission, is not detrimental to the public interest and shall approve it.⁴⁸⁴ The specific conditions the Commission shall impose will be delineated in the Ordered Paragraphs below.

THE COMMISSION ORDERS THAT:

1. Stoddard County Sewer Company, Inc.'s, R. D. Sewer Company, L.L.C.'s and the Staff of the Missouri Public Service Commission's joint application for an order authorizing Stoddard County Sewer Co., Inc. to transfer its assets to R. D. Sewer Company, L.L.C., filed on March 4, 2008, is hereby granted, subject to the conditions delineated in the ordered paragraphs below.

2. R. D. Sewer Company, L.L.C., is authorized to acquire the

⁴⁸⁴ The approved transfer carries with it the need for the Commission to grant R. D. Sewer a certificate of convenience and necessity to provide sewer service in the same service area that Stoddard County services now. The findings in this case support the conclusion that R. D. Sewer has met all Commission requirements for the grant of the CCN, i.e. the plant is already constructed, there is a need for service, no other provider can provide that service, R. D. Sewer has demonstrated it has the technical, managerial and financial experience to provide sewer service to this service area, and it would promote the public interest for sewer service to be provided to this service area. See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

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assets Stoddard County Sewer Co., Inc. as described in Paragraphs 42 and 43 of the joint application filed on March 4, 2008 and, to the extent any law requires Commission approval, is authorized to acquire and assume the stocks, bonds, and other indebtedness and obligations of Stoddard County Sewer Co., Inc.

3. Stoddard County Sewer Company, Inc., R. D. Sewer Company, L.L.C. and the Staff of the Missouri Public Service Commission are authorized to take any and all other lawful actions that may be reasonably necessary and incidental to the performance of the approved Joint Application for the transfer of assets.

4. Prior to this Report and Order authorizing the transfer of Stoddard County Sewer Co., Inc.'s assets and obligations to R. D. Sewer Company, L.L.C., Stoddard County Sewer Co., Inc. has never secured from the Commission an order authorizing the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of the assets described in Paragraphs 42 and 43 of the joint application to authorize said transfer that was filed on March 4, 2008.

5. Any purported transfer of an interest in the assets of Stoddard County Sewer Co., Inc., as described in Paragraphs 42 and 43 of the March 4, 2008 joint application to authorize the transfer of Stoddard County Sewer Co., Inc.'s assets to R. D. Sewer Company, L.L.C. after the date the asset was placed in service to the public that lacks authorization or approval from the Missouri Public Service Commission is void.

6. Stoddard County Sewer Company, Inc.'s, R. D. Sewer Company, L.L.C.'s and the Staff of the Missouri Public Service Commission's joint application for an order establishing new, interim rates for R. D. Sewer Company, L.L.C. subject to review, filed on March 4, 2008, is hereby granted, subject to the conditions delineated in the ordered paragraphs below.

7. The cost structure of Stoddard County Company, Inc., as determined by the Commission and as fully described in the body of this order, shall be the cost structure utilized for establishing the interim rates for sewer service for R. D. Sewer Company, L.L.C. immediately upon completion of the transfer of assets.

8. Authorization of the transactions described in the Ordered Paragraphs above are subject to the following conditions:

a. No later than thirty days after the date of issue of this Report and Order, R. D. Sewer Company, L.L.C. shall file with the Commission tariff sheets in compliance with this order establishing the interim rates and

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rate design sufficient to recover revenues based upon the cost structure as determined in this Report and Order;

b. The tariffs filed by R. D. Sewer Company, L.L.C. shall include provisions for billing customers by monthly statement instead of the current practice of providing a yearly billing booklet, and for charging customers a late fee of Five Dollars (\$5.00) if the monthly bill is not paid by the 20th day after the bill date;

c. The compliance tariffs filed by R. D. Sewer Company, L.L.C. shall bear an effective date of no less than 30 days; however, the company is authorized to file a motion for expedited approval of the tariffs, and the Commission has already determined, in this Report and Order, that good cause exists for expedited approval if the filed tariffs are found to be in compliance with this Report and Order;

d. Any interim rates approved by the Commission for R. D. Sewer Company, L.L.C. in association with this case shall be made subject to refund based upon an earnings review;

e. No later than thirty days after the effective date of this Report and Order, R. D. Sewer Company, L.L.C. shall file with the Commission a formal small sewer company rate increase case pursuant to Commission Rule 4 CSR 240-3.050;

f. No later than three years after the effective date of this Report and Order, R. D. Sewer Company, L.L.C. shall file with the Commission a formal small sewer company rate increase case pursuant to Commission Rule 4 CSR 240-3.050 or the applicable rule in effect at that time;

g. Pursuant to the directions in the companion order to be issued in this matter that concludes the unapproved security interests in Stoddard County's assets are void, R. D. Sewer shall file a certified copy of the companion order with the Stoddard County Recorder and the Secretary of State.

9. No later than five days after R. D. Sewer Company, L.L.C. files the compliance tariffs directed by this order, the Staff of the Missouri Public Service Commission shall file with the Commission a recommendation stating if the tariffs are in compliance and providing the Commission with a recommendation as to if those tariffs should be approved. Any party wishing to respond to Staff's recommendation shall file said response no later than two days following the filing of Staff's recommendation.

10. The certificates of convenience and necessity heretofore issued to Stoddard County Sewer Company, Inc., in Case Number SA-

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79-11 and Case Number SA-86-115, are cancelled.

11. R. D. Sewer Company, L.L.C. is granted a certificate of convenience and necessity to provide sewer service to the sewer customers in the former service area of Stoddard County Sewer Company, Inc. The legal description of this service area is identical to the legal description of Stoddard County's present service area, as contained in Stoddard County's tariff now on file with the Commission.

12. The Commission's August 5, 2008 order requiring Stoddard County Sewer Company, Inc. to file quarterly and other status reports is cancelled.

13. R. D. Sewer Company, L.L.C. shall file with the Commission semi-annual status reports. Those status reports shall include updated information regarding R. D. Sewer Company, L.L.C.'s negotiations with the Missouri Department of Natural Resources for a compliance schedule and include a report of the actions R. D. Sewer Company, L.L.C. has implemented to improve the repair, maintenance and overall condition of its waste water treatment plant.

14. R. D. Sewer Company, L.L.C. shall file with the Commission a copy of the compliance schedule it executes with the Missouri Department of Natural Resources as soon as it is formalized with the Missouri Department of Natural Resources and the Missouri Attorney General's Office. As part of R. D. Sewer Company, L.L.C.'s semi-annual status reports, R. D. Sewer Company, L.L.C. shall report to the Commission the steps it has taken to implement the compliance schedule it executes with the Missouri Department of Natural Resources.

15. Beginning on November 1, 2009, the Staff of the Missouri Public Service Commission shall commence annual inspections of R. D. Sewer Company, L.L.C. and shall within thirty days of completing those inspection file with the Commission a report describing the operating conditions of R. D. Sewer Company, L.L.C.'s waste water treatment plant.

16. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein are hereby denied.

17. The Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

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18. This Report and Order shall become effective on November 2, 2008.

David, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

NOTE: A Notice of Correction to this order was also issued on October 23, 2008.

NOTE: Other orders in this case can be found at pages 259, 263, and 278.

In the Matter of the Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., L.L.C., and for an Interim Rate Increase.*

*Case No. SO-2008-0289
Decided: October 23, 2008*

Sewer §1. The Commission voided security interests delineated in the order.

**ORDER CONCLUDING SECURITY INTERESTS VOID
AS A MATTER OF LAW**

Pursuant to the Commission's Report and Order issued on October 23, 2008, bearing the effective date of November 2, 2008, and the Findings of Fact and Conclusions of Law, therein, the Commission concludes that to the extent the purported security interests listed below, which were not approved or authorized by the Commission, sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber, in whole or in part, the franchise, works or system, or assets of any kind necessary or useful in the performance of Stoddard County Sewer Company, Inc.'s duties to the public, said interests are void as a matter of law pursuant to Section 393.190.1, RSMo, 2000 and its amendments and supplements.¹

¹ Section 393.190.1 provides, in pertinent part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of

*The case was appealed to the Missouri Court of Appeals (WD) and was dismissed as moot. See 328 SW 3d 347. (Mo. App. W.D. 2010)

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The purported security interests that are void are as follows:

(1) Deed of Trust and Security Agreement by and between Stoddard County Sewer Co., Inc. and Clinton Enterprises, dated May 24, 1996 and recorded on June 3, 1996, in **Book 289 at Pages 451-463** of the land records of Stoddard County, Missouri,² which purports to grant, bargain, sell, transfer, pledge, mortgage, warrant, hypothecate and convey to the trustee (Clinton Enterprises) with the power of sale, all of the following described property, including all of the rights, title, interest and estate of Borrower, in and to the following:

All those certain lots, pieces or parcels of land and other estates or interests in real estate (hereinafter referred to as the "Land") together with and including all right, title, interest and estate of Borrower therein, situate, lying and being in the County of Stoddard, State of Missouri, legally described as:

its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. . . . (Emphasis added).

² Documents that were executed in association with the Deed of Trust and Security Agreement, and that were incorporated by reference in paragraph 15 of the Deed of Trust and Security Agreement, entitled "Additional Filings", include:

Deed of Trust and Security Agreement by and between Stoddard County Sewer Co., Inc. and Clinton Enterprises, dated May 24, 1996 (unrecorded), with Rice P. Burns, Jr. of Scott County, Missouri designated as trustee.

Promissory Note executed May 24, 1996 with a payment deadline of May 24, 1997, in the amount of \$100,000.00 from Carl Bien and Ruth Bien to Clinton Enterprises.

Corporation Guaranty Agreement by and between Clinton Enterprises and Carl Bien and Ruth Bien dated May 24, 1996; Security Agreement by and between Bien Co., Inc. and Clinton Enterprises dated May 24, 1996.

Uniform Commercial Code - Financing Statement from Bien Co., Inc. to Clinton Enterprises.

Modification and Extension Agreement by and between Carl Bien and Ruth Bien and Clinton Enterprises, dated June 3, 1997.

Note dated June 3, 1997 in the amount of \$30,000.00 from Carl Bien and Ruth Bien to Clinton Enterprises.

To the extent any of these documents convey an interest in Stoddard County Sewer Co., Inc. and any of its assets that are not encompassed within the Deed of Trust and Security Agreement purported to convey, the transactions encompassed within these agreements are also void pursuant to Section 393.190, RSMo 2000.

STODDARD COUNTY SEWER COMPANY, INC.,
R.D. SEWER CO., L.L.C.

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All of Lot 1 and the North 35 feet of Lot 2 in Block 1 of Ecology Acres Subdivision, as recorded in Plat Book 8 at Page 4 in the Recorder of Deeds Office of Stoddard County, Missouri.

Together with all estates, tenements, hereditaments, privileges, easements, franchises, licenses, permits and appurtenances belonging or in any wise appertaining to the Land: and all improvements (hereinafter referred to as the "Improvements") which are located on the Land including, without limitation, buildings, warehouses, fences, all utility lines, and equipment, air conditioning and heating equipment, and all additions, substitutions and replacements thereof. The Land and Improvements are hereinafter collectively referred to as the "Trust Premises."

To have and to hold unto the Trustee, its successors and assigns forever, to secure a promissory note to Clinton Enterprises in the amount of \$100,000.

(2) Trust Deed by and between Carl Bien and Ruth Bien and Rice P. Burns, Jr., Trustee of the County of Scott and Clinton Enterprises dated September 8, 1997, recorded September 17, 1997 in **Book 298 at Pages 898-901** of the land records of Stoddard County, Missouri. This document purports to convey in trust:

Part of the South Half of the South Half of the Southwest Quarter of Section 3, Township 25 North, Range 10 East, more particularly described as follows: Beginning at the Northwest corner of the South Half of the South Half of the Southwest Quarter of Section 3 aforesaid; thence East 375 feet; thence South 465 feet; thence West 375 feet; thence North 465 feet to the point of beginning.

To have and hold the same, with the appurtenances, to secure a promissory note to Clinton Enterprises in the amount of \$30,000.

(3) Deed of Trust by and between Stoddard County Sewer Co., Inc. and Citizens Bank of Dexter dated April 30, 1980, signed by Carl Bien on behalf of Bien & Gibbs Lumber Company, Inc., and recorded April 30, 1980 in **Book 209 at Pages 632-635** of the land records of Stoddard County, Missouri; which purports to convey:

All of Lot 1 and the North 35 feet of Lot 2 in Block 1 of Ecology Acres Subdivision, as recorded in Plat Book 8 at

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Page 4 in the Recorder of Deeds Office of Stoddard County, Missouri.

Together with and including all buildings, all fixtures, including but not limited to all plumbing, heating, lighting, ventilating, refrigerating, incinerating, air conditioning apparatus and elevators (the Trustee hereby declaring that it is intended that the items herein enumerated shall be deemed to "have been permanently installed as part of the realty), and all improvements now or hereinafter existing thereon: the hereditaments, and appurtenances and all other rights thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, and the rents, issues and profits of the above described property.

To have and to hold the unto the Trustee, and the successors in interest of the Trustee, forever, in fee simple or other estate, if any, as is stated herein in trust, to secure the payment of a promissory note of this date in the principal sum of Five Hundred and fifty Thousand Dollars (\$550,000).

(4) Assignment of Secured Note between the Citizens Bank of Dexter and the Small Business Administration (located at 815 Olive St. St. Louis, Missouri) all right and title in the promissory note described in item **(3) above** on December 14, 1983; recorded on December 22, 1983, in **Book 71 at Pages 39-40** of the land records of Stoddard County, Missouri.¹

(5) Second Deed of Trust, executed March 1, 2000 between Stoddard County Sewer Co., Inc. and Ed Maglasang, Trustee of the county of St. Louis, State of Missouri, wherein Stoddard County Sewer Co., Inc., conveyed the following real estate:

All of Lot 1 and the North 35 feet of Lot 2 in Block 1 of Ecology Acres subdivision, as recorded .in, Plat Book 8 at Page 4 in the Recorder of Deeds Office of Stoddard County, Missouri.

To hold with the appurtenances in trust for the promissory note executed and delivered to Michael Brennan for the value received of \$40,000. This instrument was recorded in the Office of the Recorder of Deeds for Stoddard County, Missouri on May 3, 2000, in **Book 324, at page 136-137**.

¹ The underlying security interest is void.

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Being void, the security interests listed above cannot in any way bind, nor can the obligations contained therein be transferred to, R. D. Sewer Co., L.L.C., Stoddard County Sewer Co., Inc.'s successor in interest.

THE COMMISSION ORDERS THAT:

1. The purported security interests delineated in the body of this order, are void as a matter of law.
2. No later than November 9, 2008, R. D. Sewer Co., L.L.C. shall file and record a certified copy of this order with the Stoddard County Recorder and Registrar of Deeds and Records, P.O. Box 217, Bloomfield, Missouri.
3. No later than November 9, 2008, R. D. Sewer Co., L.L.C. shall file a certified copy of this order with the Missouri Secretary of State.
4. This order shall become effective on November 2, 2008.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

Stearley, Senior Regulatory Law Judge

NOTE: Other orders in this case can be found at pages 132, 263, and 278.

In the Matter of the Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., L.L.C., and for an Interim Rate Increase.*

*Case No. SO-2008-0289
Decided November 4, 2008*

Sewer §1. Because the Missouri Secretary of State indicates that no security interests are on file in its office again Stoddard County Sewer Company, Inc., the Commission cancels its previous order requiring R.D. Sewer Company, L.L.C. (Stoddard County's successor in interest) to file a copy of the Commission's October 23, 2008 "Order Concluding Security Interests Void as a Matter of Law."

Sewer §3. Pursuant to Section 386.570, RSMo 2000, R.D. Sewer Company, L.L.C. is obligated, subject to statutory penalty, to comply with the Commission's order requiring it to file order declaring security interests void. Canceling the order, cancels the obligation.

*The case was appealed to the Missouri Court of Appeals (WD) and was dismissed as moot. See 328 SW 3d 347. (Mo. App. W.D. 2010)

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Sewer §4. Security interests issued against the whole or part of Stoddard County Sewer Company, Inc. that is necessary in the performance of its duty to the public without prior Commission approval are void.

Sewer §5. Stoddard County and R. D. Sewer are "sewer corporations" and a "public utilities," as defined in Sections 386.020(49) and (43), RSMo Cum. Supp. 2008, respectively, and are subject to the jurisdiction, supervision, and control of the Commission.

Sewer §25. A certified copy of the Commission's order voiding the non-approved security interests must be filed with County Recorder and Registrar of Deeds and Records, and with the Missouri Secretary of State, unless otherwise directed by the Commission.

Sewer §26. Pursuant to Section 393.190, no security interest against the whole or part of the sewer company that is necessary in the performance of its duty to the public can be issued without prior Commission approval.

Security Issues §16. Pursuant to Section 393.190, no security interest against the whole or part of the sewer company that is necessary in the performance of its duty to the public can be issued without prior Commission approval.

**ORDER CANCELLING SECRETARY OF STATE FILING
REQUIREMENT**

On October 23, 2008,¹ the Commission issued an order in this matter captioned "Order Concluding Security Interests Void as a Matter of Law" ("Order"). The Commission directed R. D. Sewer Co., L.L.C. ("R. D. Sewer") to file a copy of the Order with the Missouri Secretary of State ("Secretary"). On October 31, R. D. Sewer filed a notice with the Commission stating that the Secretary had refused to accept that filing because no entity named in the Order has any security interests on record with the Secretary. Consequently, R. D. Sewer is unable to comply with that portion of the Order and seeks further direction from the Commission.

Because the Secretary has indicated that no security interests are on file for the entities in question there is no need to require R. D. Sewer to file the Order with the Secretary. The Commission shall cancel the requirement of filing the Order with the Secretary.

IT IS ORDERED THAT:

1. The requirement for R. D. Sewer Co., L.L.C. to file a copy of the Commission's October 23, 2008 "Order Concluding Security Interests Void as a Matter of Law" with the Missouri Secretary of State is cancelled.
2. This order shall become effective immediately upon issue.

¹ All dates throughout this order refer to the year 2008 unless otherwise noted.

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Harold Stearley, Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 4th day of November, 2008.

NOTE: Other orders in this case can be found at pages 132, 259, and 278.

**In the Matter of the Empire District Electric Company of Joplin,
Missouri for Authority to File Tariffs Increasing Rates for Electric
Service Provided to Customers in the Missouri Service Area of the
Company.***

*Case No. ER-2006-0315
Decided November 14, 2008*

Evidence, Practice and Procedure§1. In compliance with a mandate from the Missouri Supreme Court, the Commission vacated an order that approved a rate case compliance tariff on an expedited basis.

**ORDER VACATING DECEMBER 29, 2006 ORDER GRANTING
EXPEDITED TREATMENT AND APPROVING TARIFFS**

On November 19, 2007, the Commission received the mandate and final opinion of the Missouri Supreme Court in Case No. SC88390 issued by the Supreme Court on November 15, 2007. According to that mandate, the Commission must vacate its Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006 (December 29, 2006 Order).

The Supreme Court issued further direction to the Commission on October 14, 2008 in SC89176. In that opinion, the Court stated that the Commission's order vacating the December 29, 2006 Order did not comply with the Court's previous mandate and it directed the Commission to comply with that mandate. Thus, the Commission hereby vacates its order as directed.

THE COMMISSION ORDERS THAT:

1. The Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006, is vacated.
2. This order is effective upon issuance.

*The case was appealed to the Missouri Court of Appeals (WD) and was affirmed. See 328 SW 3d 329. (Mo. App. W.D. 2010)

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Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: Another order in this case can be found at page 273.

**In the Matter of Missouri-American Water Company's Request for
Authority to Implement a General Rate Increase for Water and
Sewer Service Provided in Missouri Service Areas**

*Case No. WR-2008-0311
Decided: November 14, 2008*

Evidence, Practice and Procedure §8. Although an agreement entered into by fewer than all of the parties is non-unanimous, if no party objects to the agreement the Commission may treat the agreement as unanimous.

Evidence, Practice and Procedure §8. Every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.

ORDER APPROVING STIPULATIONS AND AGREEMENTS

Syllabus: This order approves both the Stipulation and Agreement entered into between Missouri-American Water Company and Metropolitan St. Louis Sewer District and the global Stipulation and Agreement between the parties.

Background

On March 31, 2008, Missouri-American Water Company filed with the Missouri Public Service Commission revised tariffs sheets designed to provide an increase of \$49,622,515, or 26.4%, in the company's gross annual water revenues¹ and an increase of \$133,012, or 28.7%, in the company's gross annual sewer revenues.² The revised tariff sheets bore an effective date of April 30, 2008. The Commission issued an order³ suspending the tariff sheets until February 28, 2009. In

¹ Case No. WR-2008-0311.

² Case No. SR-2008-0312

³ See Suspension Order and Notice, Order Setting Hearings, Order Directing Filing, and Order Consolidating Cases, *issued* April 3, 2008.

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the same order, the Commission also consolidated the water and sewer cases, with the water case being the lead case. Soon after the Commission issued its order suspending the tariff sheets, a number of entities⁴ sought and were granted intervention.⁵

Local Public Hearings

In response to the Office of the Public Counsel's request, the Commission scheduled and held local public hearings in the Missouri cities of Mexico, Warrensburg, Parkville, Joplin, St. Joseph, St. Charles, Jefferson City, Kirkwood and Warrenton. The Commission also held a local public hearing in St. Louis County. Through the local public hearings, the Commission heard the testimony of approximately 79 witnesses.

Stipulation and Agreement between Missouri-American and Metropolitan St. Louis Sewer District

On September 17, 2008, Missouri-American and Metropolitan St. Louis Sewer District (MSD) filed a Stipulation and Agreement. Although the Office of the Public Counsel initially expressed opposition to the agreement, it filed a pleading on November 10 stating that it no longer opposes the Agreement. Public Counsel was the only party that expressed concern about this Agreement. If no party objects to the agreement it may be treated as unanimous.⁶ Because the Agreement is treated as unanimous, no issue remains for determination after hearing.⁷

The Agreement requires:

- Missouri-American to provide water usage meter reading data and customer billing information and related services to MSD.
- For the information and related services described above, MSD will pay Missouri-American \$29,166 per month.
- The specific terms and conditions of providing the billing data and related services shall continue to be governed by the Water Usage Data Agreement dated November 29,

⁴ The intervenors are: AG Processing, Inc.; Public Water Supply District Nos. 1 and 2 of Andrew County; Public Water Supply District No. 1 of DeKalb County; City of Jefferson, Missouri; Missouri Industrial Energy Consumers; Missouri Energy Group; Utility Workers Union of America Local 335; City of Joplin, Missouri; Metropolitan St. Louis Sewer District; City of Parkville, Missouri; Park University; City of Lake Waukomis, Missouri; City of Riverside, Missouri; and Missouri Gaming Company.

⁵ See Order Granting Applications to Intervene, *issued* May 2, 2008.

⁶ Commission rule 4 CSR 240-2.115(2)(C).

⁷ *Id.* Subsection (D).

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2007.⁸

- Neither Missouri-American nor MSD will take any action to alter the terms of the Agreement prior to Missouri-American's next general rate case.

Conclusion

The Commission notes that every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.⁹ Consequently, the Commission need not make findings of fact or conclusions of law in this order. The Commission finds the Stipulation and Agreement reasonable, will approve it and direct the parties to abide by its terms.

Global Stipulation and Agreement

During the course the evidentiary hearings, the parties at various times requested that the hearing be delayed or cancelled on certain days. As a result, negotiations were facilitated and on November 10, 2008, the parties¹⁰ filed a Unanimous Stipulation and Agreement.

Although the parties characterized the Agreement as unanimous, the City of Jefferson, Missouri is not a signatory. Under Commission rules,¹¹ an agreement entered by fewer than all of the parties is nonunanimous. However, on November 13, Jefferson City filed a statement that it does not oppose the Agreement and does not request a hearing. If no party objects to an agreement, the Commission may treat it as unanimous.¹² The Commission will therefore treat the Agreement as unanimous.

The Terms of the Agreement

Generally, the parties agreed on the following terms. The specific and complete terms are set out in the Agreement, which is attached to this order.

Annual Revenue Requirement

The parties agree that Missouri-American's revenue requirement is \$225,271,638, which shall be achieved by increasing the company's rate base by \$34,471,092 annually.

⁸ Approved by order of the Commission issued on April 1, 2008, in Case No. WO-2008-0240.

⁹ Section 536.090, RSMo 2000.

¹⁰ City of Parkville, Missouri, Park University and City of Lake Waukomis, Missouri withdrew from the case on October 20, 2008, and are not signatories to the Agreement.

¹¹ Commission rule 4 CSR 240-2.115(2)(A).

¹² *Id.* (2)(C).

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Rate Design/Cost of Service

The revenue increase shall be allocated to each District as follows:¹³

Brunswick Water	\$107,734
Jefferson City	\$714,952
Joplin	\$3,311,550
Mexico	\$211,736
Parkville Sewer	\$8,312
Parkville Water	\$1,121,132
St. Joseph	(\$432,207)
Warrensburg	\$756,620
Warren County Water	\$68,655
Warren County Sewer	\$49,245
Cedar Hill	\$94,323
St. Louis Metro	\$28,459,040

Pension/FAS Tracker Mechanism and OPEB/FAS Tracker Mechanism

Missouri-American and the Staff of the Commission agree that Missouri-American will continue to use the Pension/FAS 87 and OPEB/FAS 106 "Tracker Mechanisms" as established in the stipulation approved by the Commission in Case No. WR-2007-0216. This stipulation is further described in Attachment C to the Agreement.

OPEB Permanent Investment

As is set out in the Agreement; "The Signatories agree that Missouri-American will amortize the OPEB 'permanent investment' from Case No. WR-95-205 to expense for ratemaking purposes over a period of not less than five years. The amortization will begin with the first month that new rates become effective as a result of Case No. WR-2008-0311."

Tank Painting Tracker

As is set out in the Agreement; "The Signatories agree that Missouri-American will continue the regulatory asset or liability for tank painting and inspection expense previously established in Case No. WR-2007-0216. The regulatory asset or liability will increase or decrease each year by the same amount that actual tank painting and inspection expense is either greater or less than \$1,000,000. The tracker will be maintained through the effective date of the rates established in the next general rate proceeding. The method of recovery of any amounts

¹³ This information is as set out in Appendix A, attached to the Agreement.

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accumulated (under or over) will be determined in the next general rate proceeding.”

Call Center Records

In this regard, Missouri-American currently reports quarterly to Staff and Public Counsel. The parties now agree that these reports will be made monthly. Additionally, Missouri-American agrees to report technological advances made in the company's Alton, Illinois and Pensacola, Florida call centers in areas such as virtual hold technology and the ability to record all incoming calls.

Customer Records Information

Missouri-American shall retain, through each subsequent rate case, monthly customer records information that would provide to the parties the number of customers for each customer class and meter size.

Bad Debt/Recovery Tracking

Missouri-American agrees to track actual bad debt write-offs and recoveries separately for each operating district within its service area.

Infrastructure System Replacement Surcharge

The parties agree that for any ISRS filings implemented between the effective date of new rates and those of the next rate case, the overall rate of return shall be computed by using a 10% return on common equity and the company's capital structure filed in this case.

Depreciation

Missouri-American shall continue to use the depreciation rates authorized in Commission Case No. WR-2007-0216. The rates are included in Attachment D to the Agreement.

Class Cost of Service Studies

Missouri-American will perform a Class Cost of Service study for each district and file it as part of the Company's next rate filing.

Work Papers

Missouri-American will provide to Staff, Public Counsel and any other requesting Signatory, complete copies of the work papers relating to any cost studies submitted as a part of its next rate filing.

City of Riverside

Missouri-American and the City of Riverside agree to work together informally to address issues relating to infrastructure and fire flows in the City.

Triumph Food, LLC

With the purpose of determining whether the alternative rate continues to be in the best interest of all customers in Missouri-American's St. Joseph service area, Missouri-American agrees not to

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oppose Public Counsel or Staff's request for Commission review of such rate as set forth in the Contract for Retail Sale and Delivery of Potable Water between Missouri-American and Triumph.

Customer Classifications and Cost Studies

The company agrees to participate in a collaborative working group to perform a review of cost of service issues. The review will be completed within 90 days of the effective date of new rates in this case.

Conclusion

The Commission notes that every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.¹⁴ Consequently, the Commission need not make findings of fact or conclusions of law in this order. The Commission finds the Stipulation and Agreement reasonable, will approve it and direct the parties to abide by its terms.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement between Missouri-American Water Company and Metropolitan St. Louis Sewer District filed on September 17, 2008, is approved.

2. Missouri-American Water Company and Metropolitan St. Louis Sewer District shall comply with the terms of the Stipulation and Agreement approved in ordered paragraph 1.

3. The following proposed water and sewer service tariff sheets submitted on March 31, 2008, by Missouri-American Water Company are rejected:

P.S.C. Mo. No. 6

14 th Revised Sheet No. RT 1.0, Canceling	13 th Revised Sheet No. RT 1.0
14 th Revised Sheet No. RT 2.0, Canceling	13 th Revised Sheet No. RT 2.0
14 th Revised Sheet No. RT 2.1, Canceling	13 th Revised Sheet No. RT 2.1
14 th Revised Sheet No. RT 2.2, Canceling	13 th Revised Sheet No. RT 2.2
11 th Revised Sheet No. RT 2.3, Canceling	10 th Revised Sheet No. RT 2.3
11 th Revised Sheet No. RT 3.0, Canceling	10 th Revised Sheet No. RT 3.0
10 th Revised Sheet No. RT 3.1, Canceling	9 th Revised Sheet No. RT 3.1
12 th Revised Sheet No. RT 4.0, Canceling	11 th Revised Sheet No. RT. 4.0
14 th Revised Sheet No. 5.0, Canceling	13 th Revised Sheet No. RT 5.0
14 th Revised Sheet No. RT 5.1, Canceling	13 th Revised Sheet No. RT 5.1
14 th Revised Sheet No. RT 5.2, Canceling	13 th Revised Sheet No. RT 5.2
14 th Revised Sheet No. RT 7.0, Canceling	13 th Revised Sheet No. RT 7.0
14 th Revised Sheet No. RT 8.0, Canceling	13 th Revised Sheet No. RT 8.0

¹⁴ Section 536.090, RSMo 2000.

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P.S.C. Mo. No. 3

12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1
8th Revised Sheet No. 2, Canceling 7th Revised Sheet No. 2
5th Revised Sheet No. 2A, Canceling 4th Revised Sheet No. 2a
3rd Revised Sheet No. 5A, Canceling 2nd Revised Sheet No. 5A
11th Revised Sheet No. 4, Canceling 10th Revised Sheet No. 4

P.S.C. Mo. No. 2

13th Revised Sheet No. 3, Canceling 12th Revised Sheet No. 3

P.S.C. Mo. No. 1

13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1

P.S.C. Mo. No. 7

1st Revised Sheet No. 1, Canceling Original Sheet No. 1
2nd Revised Sheet No. 4, Canceling 1st Revised Sheet No. 4
Original Sheet No. 28
Original Sheet No. 28.1
Original Sheet No. 28.2

P.S.C. No. 2

Revised Sheet No. 2(a), Canceling Original Sheet No. 2(a)
10th Revised Sheet No. A-1, Canceling 9th Revised Sheet No. A-1
10th Revised Sheet No. B-1, Canceling 9th Revised Sheet No. B-1
10th Revised Sheet No. C-1, Canceling 9th Revised Sheet No. C-1
11th Revised Sheet No. D-1, Canceling 10th Revised Sheet No. D-1
9th Revised Sheet No. E-1, Canceling 8th Revised Sheet No. E-1
7th Revised Sheet No. E-4, Canceling 6th Revised Sheet No. E-4
Original Sheet No. E-10
Original Sheet No. E-10.1
Original Sheet No. E-10.2

P.S.C. Mo. No. 8

4th Revised Sheet No. 4, Canceling 3rd Revised Sheet No. 4

P.S.C. Mo. No. 2

5th Revised Sheet No. 4, Canceling 4th Revised Sheet No. 4

P.S.C. Mo. No. 7

2nd Revised Sheet No. 9, Canceling 1st Revised Sheet No. 9

4. The Unanimous Stipulation and Agreement filed on November 10, 2008 is approved as a resolution of all issues except those resolved between Missouri-American Water Company and Metropolitan St. Louis Sewer District.

5. The parties are ordered to comply with the terms of the Unanimous Stipulation and Agreement.

6. Missouri-American Water Company shall file tariff sheets

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that comply with and are consistent with the terms of the Unanimous Stipulation and Agreement and the Agreement with Metropolitan St. Louis Sewer District.

7. This order shall become effective on November 24, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

***NOTE:** A Notice of Correction was issued in this case on November 19, 2008. The Notice and Stipulations and Agreements have not been published and are available in the official case files of the Public Service Commission.

**In the Matter of the Empire District Electric Company of Joplin,
Missouri for Authority to File Tariffs Increasing Rates for Electric
Service Provided to Customers in the Missouri Service Area of the
Company.***

*Case No. ER-2006-0315
Decided: November 20, 2008*

Evidence, Practice and Procedure §1. The Commission denied all pending application for rehearing, finding that there was not sufficient reason to rehear its decision.

ORDER DENYING APPLICATIONS FOR REHEARING

On December 21, 2006, the Commission issued its Report and Order in this matter. That Report and Order was amended by an Order Supplementing and Clarifying Report and Order issued on January 9, 2007, and an Order Granting Reconsideration of Report and Order (with attached Report and Order Upon Reconsideration) issued on March 26, 2008 (hereinafter referred to as the "March 26, 2008 Order"). The latter order was effective on April 5, 2008.

Timely applications for rehearing of the original Report and Order as well as the March 26, 2008 Order were filed by Praxair, Inc., and Explorer Pipeline, and by the Office of the Public Counsel. Other applications for rehearing and reconsideration have been filed in this matter and have either been disposed of by previous orders or have

*The case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 328 SW 3d 329. (Mo. App. W.D. 2010)

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been made moot by mandates issued by the Missouri Supreme Court. It is the intent of the Commission, however, to address all applications for rehearing so that the parties may have a final decision.

Section 386.500.1, RSMo 2000, provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." In the judgment of the Commission, there is not sufficient reason to grant any application for rehearing in this matter. All applications for rehearing are denied.

THE COMMISSION ORDERS THAT:

1. All pending applications for rehearing in this matter are denied.
2. This order shall become effective upon issuance.

Davis, Chm., Murray, Jarrett,
and Gunn, CC., concur.
Clayton, C., dissents.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: Another order in this case can be found at page 265.

**In the Matter of the Name Change Request from Aquila, Inc. d/b/a
KCP&L Greater Missouri Operations Company to KCP&L Greater
Missouri Operations Company**

Case No. EN-2009-0164
Decided November 20, 2013

ELECTRIC §1. Missouri Public Service Commission recognized name change from Aquila, Inc., d/b/a Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company.

REPORT AND ORDER
Recognizing Name Change

The Missouri Public Service Commission grants the application for recognition of the following name change:

From: Aquila, Inc., d/b/a KCP&L Greater Missouri
Operations Company
To: KCP&L Greater Missouri Operations Company
For: providing electricity service.

AQUILA, INC., D/B/A KCP&L GREATER
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The Commission received the application, with an adoption notice and amended tariff title page, on November 3, 2008. On November 18, 2008, the Commission's Staff filed its recommendation supporting approval of the application.

Such an application must include:

(A) A statement, clearly setting out both the old name and the new name;

* * *

(C) [An] adoption notice and revised tariff title sheet with an effective date which is not fewer than thirty (30) days after the filing date of the application[.¹]

Those items are present in the application. In addition, the application must include:

(B) Evidence of registration of the name change with the Missouri secretary of state[.²]

That item is present because the application includes evidence that:

- the name change is registered with the secretary of state of Delaware, which is the state of incorporation; and
- an application for an amended certificate of authority is on file with the Missouri secretary of state.

Such evidence includes copies of documents certified by the respective officials.

Because the application meets the Commission's standards, the Commission grants the application and recognizes the name change.

The Commission orders that:

1. The name change of Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company is recognized.

2. The adoption notice issued by KCP&L Greater Missouri Operations Company on November 3, 2008, as tariff tracking number JE-2009-0312 is approved to become effective on December 3, 2008.

¹ 4 CSR 240-2.060(5).

² Id.

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3. The tariff approved is:

KCP&L Greater Missouri Operations Company PSC MO. No. 1

Title Sheet, and
Original Page 0.1.

4. This order shall become effective on December 3, 2008.

5. This case may be closed on December 4, 2008.

Jordan, Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

**In the Matter of the Name Change Request from Aquila, Inc. d/b/a
KCP&L Greater Missouri Operations Company to KCP&L Greater
Missouri Operations Company**

*Case No. HN-2009-0165
Decided November 20, 2008*

Steam §1. Missouri Public Service Commission recognized name change from Aquila, Inc.,
d/b/a Greater Missouri Operations Company to KCP&L Greater Missouri Operations
Company.

REPORT AND ORDER
RECOGNIZING NAME CHANGE

The Missouri Public Service Commission grants the application
for recognition of the following name change:

From: Aquila, Inc., d/b/a KCP&L Greater Missouri
Operations Company

To: KCP&L Greater Missouri Operations Company

For: providing steam heat service.

The Commission received the application, with an adoption notice and
amended tariff title page, on November 3, 2008. On November 18, 2008,
the Commission's Staff filed its recommendation supporting approval of
the application.

Such an application must include:

(A) A statement, clearly setting out both
the old name and the new name;

* * *

(C) [An] adoption notice and revised

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tariff title sheet with an effective date
which is not fewer than thirty (30) days
after the filing date of the application[.¹]

Those items are present in the application. In addition, the application
must include:

(B) Evidence of registration of the name
change with the Missouri secretary of
state[.²]

That item is present because the application includes evidence that:

- the name change is registered with the secretary of state
of Delaware, which is the state of incorporation; and
- an application for an amended certificate of authority is
on file with the Missouri secretary of state.

Such evidence includes copies of documents certified by the respective
officials.

Because the application meets the Commission's standards, the
Commission grants the application and recognizes the name change.

THE COMMISSION ORDERS THAT:

1. The name change of Aquila, Inc., d/b/a KCP&L Greater
Missouri Operations Company to KCP&L Greater Missouri Operations
Company is recognized.

2. The adoption notice issued by KCP&L Greater Missouri
Operations Company on November 3, 2008, as tariff tracking
number JH-2009-0313 is approved to become effective on December 3,
2008.

3. The tariff approved is:

KCP&L Greater Missouri Operations Company PSC MO. No. 1
Title Sheet, and
Original Page 0.1.

4. This order shall become effective on December 3, 2008.

5. This case may be closed on December 4, 2008.

Jordan, Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

¹ 4 CSR 240-2.060(5).

² Id.

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In the Matter of the Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., L.L.C., and for an Interim Rate Increase.*

*Case No. SO-2008-0289
Decided December 11, 2008*

Sewer §1. Pursuant to Section 386.500, RSMo 2000, the Commission concludes that Public Counsel has failed to demonstrate a sufficient reason for granting its application for rehearing or its request for a stay of the October 23, 2008 Report and Order.

Sewer §5. The Office of the Public Counsel voluntarily submitted to the Commission's jurisdiction by exercising its discretionary authority to participate in this action. Section 386.710.1; Commission Rule 4 CSR 240-2.010(11).

Evidence, Practice and Procedure §24. Granting the Office of the Public Counsel's request for a stay is contrary to Public Counsel's previously stated position of not opposing an interim rate increase subject to refund.

Granting the Office of the Public Counsel's request for a stay is contrary to the public interest because it would jeopardize the provision of safe and adequate sewer service.

Evidence, Practice and Procedure §25. Having merely restated the arguments raised during the pendency of this case, arguments that were addressed in prior interlocutory orders and the final Report and Order, the Commission finds no basis to grant the Office of the Public Counsel's application for rehearing.

Evidence, Practice and Procedure §26. Failure to demonstrate a sufficient reason for granting an application for rehearing mandates denial.

**ORDER REGARDING THE OFFICE OF THE PUBLIC COUNSEL'S
APPLICATION FOR REHEARING AND REQUEST FOR STAY**

On October 23,¹ the Commission issued its Report and Order ("Order") in this matter. On December 8, R.D. Sewer Co., L.L.C. ("R.D. Sewer") filed the last of several required compliance filings necessary to satisfy the initial conditions placed upon the Commission-approved transfer of assets. Having established its intent to comply with the Commission's conditional Order and proceed with the transfer of assets, it is now appropriate for the Commission to consider post-Order motions.

Public Counsel's Application for Rehearing

The Office of the Public Counsel ("Public Counsel") timely filed an application for rehearing and a request to stay the Report and Order pending appeal. Public Counsel's application for rehearing merely restates arguments it raised during the pendency of this case. All of

¹ All dates throughout this order refer to the year 2008 unless otherwise noted.

*This case was appealed to the Missouri Court of Appeals (WD) and was dismissed as moot. See 328 SW 3d 347 (Mo. App. W.D. 2010)

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these arguments were addressed in prior interlocutory orders issued by the Commission or in the October 23 Order. Consequently, the Commission need not re-rule on these matters.

The Commission will address one item of Public Counsel's motion simply as a matter of clarification. Public Counsel incorrectly states that because "approval was not received for the transfer of all of the stock of Stoddard County Sewer Company, Inc. (Stoddard County) from Ms. Bien to R.D. Sewer Co., L.L.C. (R.D. Sewer), the transfer was in violation of Section 393.190.2 and is void per Section 393.190.3." As the Commission concluded in its Order, Section 393.190.2 is not relevant to the Commission's approval of the transfer of assets. Approval of the requested transfer of Stoddard County assets is unrelated to who owns, or who owned, the stock of the company.

The Commission further determined that Section 393.190.2 could not apply to the transfer of stock that occurred between Mrs. Carl Bien (the prior owner of Stoddard County's stock and assets) and R. D. Sewer because R. D. Sewer is not a stock corporation subject to Section 393.190.2. However, to the extent that this statutory provision, or any other law, requires the Commission's approval of the stock transfer, the Commission granted that approval in its Order. Unlike Section 393.190.1, that has a temporal requirement that the Commission grant approval for a transfer of assets prior to the actual transfer, Section 393.190.2 has no such temporal requirement. The Commission may grant approval of a stock transfer, when required pursuant to Section 393.190.2, at any time.

Stoddard County, R.D. Sewer and the Commission's Staff offered into evidence a validly executed and notarized Assignment of Stoddard County's stock to R. D. Sewer. This evidence was admitted into the record without objection. Mrs. Bien's presence was not required for the Commission to receive this uncontroverted evidence, and to the extent that Section 393.190.2, or any other law, may require Commission approval of the stock transfer (which the Commission does not believe is necessary), it was so granted.

Public Counsel's Request to Stay, or Alternatively, Segregate Funds

Public Counsel also requests the Commission to issue a Stay Order during the appeal process, or, in the alternative, to order R. D. Sewer to record the approved interim rate increase in a separate fund and make it subject to refund. Public Counsel's request is contrary to the public interest and contrary to Public Counsel's previously stated positions in this matter.

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The Commission found competent and substantial evidence to support the requested transfer of assets and to authorize an interim rate increase for R. D. Sewer once the transfer was formalized. The Commission concluded the increase in rates was necessary to ensure the provision of safe and adequate service. In its conditional Order, the Commission directed that the interim rate increase would be subject to refund based upon an earnings review. Consequently, the Commission finds no basis for staying its Order and is unsure of what additional measures Public Counsel may be requesting in terms of its alternative request for relief.

R. D. Sewer is a small sewer company serving approximately 172 customers. The record indicates that its customer count has remained unchanged since its inception. All of the parties to this action are fully aware of the changes to be implemented by the interim rate increase and R. D. Sewer has complied with the condition of filing a formal rate case pursuant to the Commission's small company rate increase rule.¹ The Commission sees no need for a separate accounting apart from what the company will already have on-going, and R. D. Sewer's customers are sufficiently protected by the subject-to-refund condition already imposed by the Commission.² In fact, the earnings review contemplated by the Order has essentially been initiated with the filing of the formal rate case.³ Additionally, the Commission shall not require sequestration of the funds from the interim rate increase so these funds may be immediately utilized to improve the waste water treatment facility to ensure the delivery of safe and adequate service.

Public Counsel fails to demonstrate that any irreparable harm could result from the transfer of assets or from the interim rate increase to warrant a stay of the Commission's Order. In fact, the opposite is true. As is evidenced in the record, staying the Order, or in any way restricting the use of the funds from the interim rate increase, would pose an imminent threat to R. D. Sewer's customers and jeopardize the provision of safe and adequate service. Granting Public Counsel's request to stay would not only put the public at risk, but is contrary to the positions

¹ Commission Rule 4 CSR 240-3.050.

² Refunds can take the form of reimbursed funds, reduced rates or credits should it be determined that R. D. Sewer over-earned as a result of the interim rate increase.

³ R. D. Sewer initiated a formal small company rate increase request on November 26, as was required by the October 23 Order. The Commission will have ample opportunity to review R. D. Sewer's revenue requirement and the company's earnings pursuant to the interim rate increase during that matter. See Case Number SR-2009-0226.

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Public Counsel maintained throughout this proceeding.⁴

Decision

The Commission concludes that Public Counsel has failed to demonstrate a sufficient reason for granting its application for rehearing or its request for a stay of the October 23 Report and Order.⁵ Public Counsel's requests shall be denied.

THE COMMISSION ORDERS THAT:

1. The Office of the Public Counsel's Application for Rehearing is denied.
2. The Office of the Public Counsel's Request for a Stay Order Pending Appeal is denied.
3. This order shall become effective immediately upon issue.

Murray, Clayton, Gunn, CC., concur;
Davis, Chm., concurs with separate concurring opinion attached;
Jarrett, C., absent.

⁴ Indeed, Public Counsel, at multiple times stated that it did not oppose the transfer of assets and did not oppose an interim rate increase as long as it was subject to refund. Public Counsel's witness testified that the only thing Public Counsel disputed was the amount of the interim rate increase to be approved. Transcript p. 228, lines 19-25, p. 229, lines 1-3. Public Counsel has advocated multiple inconsistent positions on other material issues as well. For example: Public Counsel (1) maintained dual positions during the evidentiary hearing that the Company's Annual Reports (filed with the Commission) were both inaccurate and presumed accurate; (2) advocated a double standard on verification of public documents by challenging the Commission's witnesses' use of such documents while denying its need to verify the same documents; (3) failed to produce supporting documentation or to explain its own methodology to substantiate its position on various issues while challenging the expertise of the other subject matter experts; (4) acknowledged the Commission's statutory duty to ensure safe and adequate service while at the same time claiming the Commission had no right to exercise that duty; and, (5) advocated an interim rate increase subject to refund as being an adequate safeguard while also stating making it subject to refund was not an adequate safeguard. See Report and Order, Findings of Fact 68-90, 117-124, 154, 174, 180, 190, 192, 257, 284, and 285; Footnotes 116, 128, and 204; EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008; EFIS Docket Number 44, *Office of the Public Counsel's Motion to Dismiss for Lack of Jurisdiction*, filed August 11, 2008; EFIS docket Number 46, *Order Denying Motion in Limine*, issued August 12, 2008.

⁵ See Section 386.500, RSMo 2000.

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Stearley, Senior Regulatory Law Judge

NOTE: Other orders in this case can be found at pages 132, 259, and 263.

CONCURRENCE OF CHAIRMAN JEFF DAVIS
TO THE ORDER DENYING PUBLIC COUNSEL'S APPLICATION FOR
REHEARING AND REQUEST FOR STAY

I concur fully with my colleagues in the reasoning and decision to deny Public Counsel's application for rehearing and request for a stay of the Commission's Report and Order that was issued on October 23, 2008. I write separately to discuss other issues in this case that do not affect the outcome of this proceeding, but are deserving of public scrutiny.

First, it is my hope that the Commission's interim order marks the beginning of the end of the ongoing saga that is Stoddard County Sewer Company – problems with this utility have plagued the Commission since before I joined the Commission in May 2004. Moreover, the problems faced by Stoddard County Sewer Company are emblematic of the problems faced by many other small water and sewer systems all over the state. Ownership questions, quality of service issues and environmental problems are nothing new to this Commission. When these issues are present, the Commission always faces a Hobson's choice: do we require the operator to fix the system before awarding a rate increase or do we raise the rates and require the operator to fix the system. It's a difficult question to be decided on a case-by-case basis.

In this case, the PSC's Water and Sewer Department under the leadership of Jim Busch stepped up to do the right thing. They've helped effectuate a transfer of ownership and made sure that the company has a minimum level of cash flow to continue operation. Even though this case is a long way from the finish line and not all the issues are decided, it is important to recognize the PSC staff is really making an effort to solve some very difficult problems affecting small groups of ratepayers. Those efforts should be applauded and encouraged even if we, as Commissioners, do not always agree with their positions.

In contrast, the Public Counsel opposed and, indeed, obstructed the public interest in this case. Public Counsel, at multiple times stated it did not oppose the approval of the transfer of assets that was requested and that it did not oppose an interim rate increase as long as it was

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subject to refund. Public Counsel only identified one issue it disputed when its witness, Ted Robertson, testified as follows:

Public Counsel supports the transfer, as I understand. We also support the Commission, if they so choose to allow an interim increase in rates subject to refund, subject to the requirement that the company come in within 30 days or so to begin the small rate case procedure so we can see what the actual accurate reasonable cost structure of this company is. **The only thing we really dispute is the amount of that interim increase that you allow.** (Emphasis added).¹

Despite this acknowledgment, Public Counsel advocated for dismissal of this matter based upon Section 393.190.2, a non-applicable statutory provision concerning stock transfers not asset transfers, and has advocated multiple inconsistent positions on other material issues.²

For example: Public Counsel (1) maintained dual positions during the evidentiary hearing that the Annual Reports filed by the companies were somehow both inaccurate and presumed accurate; (2) advocated a double standard on verification of public documents by challenging the Commission's witnesses' use of such documents while denying its need to verify the same documents; (3) failed to produce documentation or to explain its own methodology to substantiate its position on various issues while challenging the expertise of the other subject matter experts; and, (4) advocated an interim rate increase subject to refund as being an adequate safeguard while also stating making it subject to refund was not an adequate safeguard. Ironically, Public Counsel even challenged the Commission's authority to consider the issue as to whether Stoddard County Sewer Company, Inc. was providing safe and adequate service to the public.³

Additionally, in its motion for rehearing, Public Counsel continues to raise specious claims of hearsay and bias in an attempt to block consideration of properly adduced testimony and reports that aided the

¹ Robertson testimony, Transcript p. 228, lines 19-25, p. 229, lines 1-3.

² See Report and Order, Findings of Fact 68-90, 117-124, 154, 174, 180, 190, 192, 257, 284, and 285; Footnotes 116, 128, and 204; EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008; EFIS Docket Number 44, *Office of the Public Counsel's Motion to Dismiss for Lack of Jurisdiction*, filed August 11, 2008; EFIS docket Number 46, *Order Denying Motion in Limine*, issued August 12, 2008.

³ *Id.* See in particular EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

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Commission with its decision.⁴ These contradictory and illusory positions are obstructionist in nature and do not promote the public interest.

Public Counsel's conduct in this case left me scratching my head as to what ultimate outcome is actually desired by the office charged with representing rank and file consumers in this state. What would Public Counsel have us do? Nothing? This Commission has a responsibility to act in a manner that promotes public health and welfare, albeit belatedly in this case. Certainly, the utility and the Commission bear the lion's share of the responsibility for the length of time it has taken to get to this point. The public should know this Commission and the employees who work here are endeavoring to correct those previous mistakes, to work diligently to solve problems affecting consumers and move forward in the public interest.

Public Counsel's constructive participation in proceedings like this could further that interest. So far, all this Commission has seen from Public Counsel in this case is what can be described as a whole lot of motion and very little progress.

The Commission's ultimate responsibility to the ratepayers in this matter requires us to have an eye towards the public interest, which in this case means an interim rate increase to fund the continued operation of the plant. The customers of this system should not be forced to wait another four years while Public Council plays games to try to get a little bit better deal, to avoid a precedent of setting interim rates that Public Counsel opposes on philosophical grounds or to further some other hidden agenda. In future proceedings I would hope that Public Counsel finds a more appropriate way to conduct itself and to help guide this Commission as to what's truly in the best interests of the consumers they are paid to represent.

⁴ *Id.*

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In the Matter of the Application of Missouri Gas Energy, a division of Southern Union Company, for an Accounting Authority Order Concerning Environmental Compliance Activities

*Case No. GU-2007-0480
Decided December 17, 2008*

Accounting §42. To be treated as an expense under an Accounting Authority Order, the item must: be of unusual nature; be of infrequent occurrence; be of significant effect; be abnormal and significantly different from the ordinary and typical activities of the company; and, not reasonable be expected to recur in the foreseeable future.

Accounting §42. The clean-up of a former manufactured gas plant sites is not of such significant size and substantial cost to be considered extraordinary or unusual.

Accounting §42. Because costs associated with the clean-up of former manufactured gas plant sites were incurred annually, those costs are not infrequent.

REPORT AND ORDER

APPEARANCES

Dean L. Cooper, Brydon, Swearngen & England, P.C. 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102. Attorney for Missouri Gas Energy, a division of Southern Union Company.

Marc D. Poston, Senior Public Counsel, Post Office Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102. Attorney for the Office of the Public Counsel and the public.

Robert S. Berlin, Senior Counsel, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102. Attorney for the Staff of the Missouri Public Service Commission.

JUDGE: Kennard L. Jones

Background

In June of 2007, Missouri Gas Energy, a division of Southern Union Company, filed with the Missouri Public Service Commission an Application for Accounting Authority Order. MGE requests special accounting treatment for costs associated with the cleanup of former manufactured gas sites purchased by Southern Union so that those costs may be considered for possible recovery in MGE's next rate case.

Manufactured gas facilities were used before the advent of

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interstate natural gas pipelines in the 1940s. Before there were interstate pipelines, gas could not be transported over long distances so gas companies manufactured gas by heating coal or oil and collecting the gas that was driven off in the process. The primary byproduct that came from this process is tar, which contains hazardous carcinogens.

Because the Staff of the Commission and the Office of the Public Counsel opposed MGE's request, the Commission held an evidentiary hearing. Thereafter, MGE, Staff and Public Counsel filed post-hearing briefs. MGE further filed a motion to strike portions of Public Counsel's brief to which Public Counsel filed a reply.

Upon consideration of the record before it, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Missouri Gas Energy, a division of Southern Union Company is a gas corporation certificated to provide natural gas in the state of Missouri.¹

2. In 1994 Southern Union purchased properties that are now MGE.²

3. MGE owns five former manufactured gas plant sites: St. Joseph, Joplin, Independence and Stations A and B in Kansas City.³

5. The properties, which were sites used for manufacturing gas, may contain coal tar and by-products, heavy metals, petroleum aromatic hydrocarbons and a wide range of chemicals.⁴

6. Under the Comprehensive Environmental Response, Compensation and Liability Act of Congress, the sites may be considered hazardous and required to be cleaned up.⁵

7. Seeking deferred accounting treatment for the costs associated with the cleanup of former manufactured gas plant sites (FMGPs), MGE filed an application for an accounting authority order.⁶

8. Although it has incurred costs for cleanup since 1994⁷, as of March of 2008, MGE had a credit of \$609,166.⁸

9. MGE did not see a net cost until June 30, 2008, in the

¹ Commission Case No. GM-94-40.

² Callaway Direct, p. 2, lines 12-15.

³ Noack Direct, p. 3-4.

⁴ Tr. 165, lines 8-14.

⁵ 42 U.S.C. §§ 9601-9675.

⁶ See Docket.

⁷ Noack Surrebuttal, p. 3, lines 5-6.

⁸ Tr. 43, lines 11-14; Ex. 10, Expenditures and Recoveries by year.

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amount of \$845,000.⁹

10. MGE has a budget of \$3 million for recurring compliance costs it expects to pay from July through December of 2008.¹⁰

11. MGE's 2007 net operating income on an adjusted basis was \$36,383,230.¹¹

12. Five percent of \$36,383,230 is \$1,819,162.

13. Including those that it owns, MGE is potentially responsible for the cleanup of 19 or 20 FMGPs.¹²

14. Costs for the remediation of FMGPs are recurring costs.¹³

15. Many companies like MGE incur remediation costs.¹⁴

16. Dennis Morgan, Senior Vice President - Litigation for Southern Union, has done work regarding manufactured gas plant sites for the company's affiliates in Texas, Oklahoma, Arizona, Rhode Island, Massachusetts and Pennsylvania.¹⁵

17. Many natural gas distribution and electric utilities throughout the United States are incurring MGP related costs.¹⁶

18. As the Director of Pricing and Regulatory Affairs¹⁷, Michael Noack is aware of 30 different public utility commissions that have issued orders regarding former manufactured gas plant sites.¹⁸

19. Crystal Callaway is employed with MGE as an Environmental Compliance Specialist.¹⁹

20. Most of Callaway's duties have to do with permitting activities, hazardous waste operations and related training.²⁰

21. Callaway's job description does not mention remediation nor was it discussed during her interview.²¹

22. Callaway's review of MGE files revealed typical activities associated with natural gas utility company environmental matters, such as regulated underground storage tank removals, spill prevention, control

⁹ Tr. 44, line 12 – p. 45, line 7.

¹⁰ Tr. 46, lines 2-4; 47, lines 5-23.

¹¹ Tr. 107, lines 4-11.

¹² Tr. 32, lines 4-13; Tr. 41, line 21 through 42, line 5.

¹³ Tr. 41, lines 8-15.

¹⁴ Tr. 46, lines 5-8. Noack Surrebuttal, p. 15, lines 34-36.

¹⁵ Tr. 68, line 25 - 69, line 3; Tr. 89, line 21 – 90, line 4.

¹⁶ Tr. 96, lines 12-20; Rebuttal Harrison, p. 6, lines 24-26.

¹⁷ Noack Direct, p. 1, lines 7-8.

¹⁸ Noack Surrebuttal, p.5, line 34 – p. 16, line 2.

¹⁹ Callaway Direct, p. 1, lines 7-8.

²⁰ Tr. 151, lines 12-19.

²¹ Tr. 151, line 23 – 152, line 1; p. 169, lines 3-5.

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and countermeasure plans, former manufactured gas plant investigations, removal of equipment containing regulated substances, asbestos and lead paint abatement and surveys, storm water permits and hazardous water notifications and reporting.²²

23. Although initially not aware of former manufactured gas plants, Callaway's involvement has recently increased.²³

24. Although Callaway is not on the cleanup sites every day, she has consultants overseeing the projects.²⁴

25. Callaway frequently consults with a project manager in New England about remediation efforts.²⁵

26. At the company's St. Joseph site, an initial assessment is being concluded and right now MGE is in the removal action, which is currently ongoing.²⁶

27. Cleanup costs are certain to occur in the near future.²⁷

28. Remediation of former manufactured gas plant sites is a normal cost of doing business for a local distribution gas company.²⁸

29. Remediation actions are not usually a significant part of MGE's normal environmental compliance activity.²⁹

30. Investigation costs at the sites are at "some level" other than significant.³⁰

31. Remediation of FMGP sites is typical of a natural gas utility.³¹

CONCLUSIONS OF LAW

Jurisdiction

Missouri Gas Energy is a gas corporation under Missouri law.³² As a gas corporation, the Commission has jurisdiction over MGE.³³ The Commission further has the jurisdiction "to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."³⁴

²² Callaway Direct, p. 2, line 19 p. 3, line 2.

²³ Tr. 153, lines 7-15.

²⁴ *Id.*

²⁵ Tr. 154, line 22 – p. 155, line 5.

²⁶ Tr. 143, lines 9-10.

²⁷ Callaway Surrebuttal, p. 1, lines 15-19.

²⁸ Robertson Rebuttal Ex. 12, p. 32.

²⁹ Callaway Surrebuttal, p. 2, lines 13-14.

³⁰ Tr. 166, 10-13.

³¹ Callaway Direct, p. 2, line 19 – p. 3, line 6.

³² Section 386.020 (18). RSMo 2000.

³³ Section 386.250 (2) RSMo 2000

³⁴ Section 393.140 (8).

The Standard for Granting an AAO

An AAO allows a utility to defer certain costs for later consideration in a general rate case. The deferral of costs in an AAO does not guarantee the utility a right to ultimately recover the amounts deferred in that future rate case.³⁵ Rather, the Commission must consider all other relevant factors when determining in the rate case the appropriate rate the utility may charge.³⁶

As a gas company subject to the Commission's jurisdiction, MGE is required by regulation to keep all its accounts in conformity with the Uniform System of Accounts (USOA) prescribed by the Federal Energy Regulatory Commission.³⁷ In general, the USOA requires that a company's net income reflect all items of profit or loss occurring during the period. The USOA, however, recognizes that special accounting treatment, what this Commission refers to as an AAO, may be appropriate when accounting for extraordinary items of profit or loss. The question then becomes, what is an extraordinary item?

The USOA indicates that an extraordinary item for which special accounting treatment would be appropriate is "of unusual nature and infrequent occurrence." Furthermore, "they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future." In addition, the USOA requires that to be considered extraordinary, the item "should be more than approximately 5 percent of income, computed before extraordinary items."³⁸

The Commission has also established a test to determine when an AAO should be granted. In a 1991 decision, often referred to as the Sibley case,³⁹ the Commission stated that it would consider the appropriateness of granting an AAO on a case by case basis. In doing so, it would approve an AAO for events that it found to be "extraordinary, unusual and unique, and not recurring."⁴⁰ The Commission's decision in the Sibley case was subsequently affirmed by the Missouri Court of

³⁵ *Missouri Gas Energy v. Pub. Serv. Comm'n*, 978 S.W.2d 434 (Mo. App. W.D. 1998).

³⁶ *Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. App. W.D. 1993).

³⁷ 4 CSR 240-40.040. The USOA for gas companies is found at 18 CFR part 201.

³⁸ 18 CFR part 201, general instruction 7.

³⁹ In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations. In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments. 1 MPSC 3d 200 (1991)

⁴⁰ *Id.* at 205.

Appeals.⁴¹

The classic example of an event that would be extraordinary, unusual and unique, and not recurring would be a fire, or flood, or ice storm that causes a large amount of damage to the utility's property. In those circumstances, it is generally agreed that the company should be permitted to defer the costs related to that extraordinary event through an AAO.⁴² However, the Commission has never limited the granting of an AAO to expenses resulting from such natural catastrophes.

On the contrary, the Commission has found that an AAO would be appropriate in a wide variety of circumstances. For example, in the Sibley case – the case in which the Commission set out its standards for the granting of an AAO – the Commission approved an AAO for the deferral of costs relating to refurbishment of the company's coal-fired generating plant.⁴³ Similarly, the Commission has granted an AAO for the deferral of costs related to a company's compliance with changed accounting standards,⁴⁴ and for a company's costs incurred to enhance security after the terrorist attacks of September 11, 2001.⁴⁵

On several occasions, the Commission has granted AAOs authorizing deferral of costs relating to actions that a utility has been required to take as a result of governmental orders, regulations, or statutes. For example, the Commission has granted AAOs for costs related to a company's compliance with emergency amendments to the Commission's cold weather rule,⁴⁶ and for expenses related to a

⁴¹ *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W. 2d 806 (Mo. App. W.D. 1993)

⁴² For an example see: In the Matter of Aquila Inc.'s Application for the Issuance of an Accounting Authority Order Relating to its Electrical Operations in the Aquila Networks-MPS Division as a Result of a Severe Ice Storm. Order Granting Accounting Authority Order, Case No. EU-2002-1053 (June 27, 2002)

⁴³ In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations. In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments. 1 MPSC 3d 200 (1991)

⁴⁴ In the Matter of the Application of Union Electric Company for an Accounting Authority Order. 1 MPSC 3d 329 (1992)

⁴⁵ In the Matter of the Joint Application of Missouri-American Water Company, St. Louis Water Company, d/b/a Missouri-American Water Company, and Jefferson City Water Works Company, d/b/a Missouri-American Water Company, for an Accounting Authority Order Relating to Security Costs. Report and Order on Remand, Case No. WO-2002-273 (November 10, 2004)

⁴⁶ In the Matter of the Application of UtiliCorp United, Inc., d/b/a Missouri Public Service and St. Joseph Light and Power Company for an Accounting Authority Order Relating to Commission Rule 4 CSR 240-13.055(13). 11 MPSC 3d 78 (2002), and In the Matter of the

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company's compliance with a gas safety line replacement program.⁴⁷

18 CFR part 201, General Instruction 7

Under this instruction, income shall reflect all items of profit and loss during the period in which such profit and loss occurs, unless such item is extraordinary. The instruction defines extraordinary as follows:

Those items . . . which are of unusual nature and infrequent occurrence . . . [and are] events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.) To be considered as extraordinary, an item should be more than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent as extraordinary.

Thus, for an item to be considered "extraordinary" it must: (1) be of unusual nature; (2) be of infrequent occurrence; (3) be of significant effect; (4) be abnormal and significantly different from the ordinary and typical activities of the company; and (5) not reasonably be expected to recur in the foreseeable future. The Commission will examine each of these qualifiers.

Unusual Nature

The word unusual is defined in the alternative as "rare."⁴⁸ Since being certificated in 1994, MGE has incurred yearly costs associated with the remediation of the FMGP sites. Those costs have been recurring and MGE expects to incur such costs in the future. Gas companies across the country similarly experience cost to clean up FMGP sites. In fact, 30 public utility commissions have dealt with this issue. Along with other environmental activities, MGE typically investigates former manufactured gas plants.

Application of Missouri Gas Energy, a Division of Southern Union Company, for an Accounting Authority Order Relating to Commission Rule 4 CSR 240-13.055(13), 11 MPSC 3d 317 (2002)

⁴⁷ In the Matter of the Tariff Revisions of Missouri Gas Energy, a Division of Southern Union Company, Designed to Increase Rates for Natural Gas Service to Customers in the Missouri Service Area of the Company, 10 MPSC 3d 369 (2001).

⁴⁸ *Thompson v. Anderson*, 107 Utah 331, 153 p.2d 665, 666 (Utah 1944).

MGE points out that its Environmental Compliance Specialist's job description does not include remediation of FMGP sites. MGE further states that this activity was not discussed in her interview. The Specialist adds that in order to affect cleanup efforts, outside expertise is employed. These facts do not support a conclusion that cleanup efforts are rare. The facts that the Specialist's job description contains no mention of remediation and it wasn't discussed during her interview are irrelevant in light of the fact that her duties certainly include remediation. That the company must hire outside help also bears no weight on whether the costs are unusual.

An examination of the Commission's decision in Sibley⁴⁹ shows that the company in that case undertook a project that was 23% of the company's net income. The cost included expenditures over a number of previous years and projected costs. MGE has also incurred costs over the years and has set out projected costs. However, MGE's projected costs are only 8% of its net income and the actual incurred costs considered within this case are only 2% of its net income. Therefore, the Sibley case does not per se support a finding that MGE's costs are unusual. Based on the above discussions, the Commission concludes that the cleanup of FMGP sites is not of such significant size and substantial cost to be considered extraordinary or unusual.

Infrequent Occurrence

MGE argues that "the costs associated with [remediation] are unusual and infrequent as to MGE and the individual sites."⁵⁰ MGE further states that, "[s]pecific remediation activities are unlikely to be repeated at each site and will not recur once the remediation of those sites is final."⁵¹ Through these arguments the company posits that each site and each activity in each site should be considered separately. There is, however, no evidence treating the remediation costs as separate sites and activities. The schedule of expenditures shows yearly costs. The company has a budget of a certain amount for remediation costs, not costs at certain sites and for certain activities. Finally, this argument does not address whether the item is of infrequent occurrence.

⁴⁹ *Report and Order*, December 20, 1991, Case Nos. EO-91-358 and EO-91-360, *In the matter of the application of Missouri Public Service for the issuance of an accounting order relating to its electrical operations*, and *In the matter of the application of Missouri Public Service for the issuance of an accounting order relating to its purchasing power commitments*, 129 P.U.R.4th 381, 1 MPSC 3d 200 (commonly referred to as the Sibley case).

⁵⁰ MGE post-hearing brief, p. 10, par 2.

⁵¹ *Id.*

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In Missouri, “words and phrases shall be taken in their plain or ordinary and usual sense. . . .”⁵² The definition of frequent is: common, familiar, current, usual, habitual and persistent.⁵³ MGE has testified: that it *frequently* consults with a project manager in New England about remediation efforts and that at the St. Joseph site, an initial assessment is being concluded, and right now they’re in the removal action, and it’s *currently* ongoing. Notably, remediation costs have persisted for 14 years. Finally, when asked why the costs are infrequent, MGE states that they are infrequent because they are variable. An analogy would be to say that because one spends varying amounts to purchase lunch every day, that person does not eat lunch frequently. The company’s Specialist testified that although remediation actions are not usually significant, they are typical. Though the company may not actively clean a site every day, MGE has spent an average of \$62,967 per month since 1994; with a low of \$345 in 1994 to a high of \$534,339 in 2003. As MGE argues, those figures do vary. However, that those costs usually occur is not belied by their variability. MGE has incurred costs for remediation every year since it was certificated by this Commission. Therefore, the costs are not infrequent.

Significant Effect

Under the definition of “extraordinary”, the events and transactions must be of “significant effect.” The Commission has no legal guidance as to what a significant effect is under these circumstances. On the record, Callaway, the Environmental Specialist, states that investigation costs at the sites are at “some level”, rather than being “significant.”

As the party asserting this issue, MGE carries the burden of showing that remediation has a significant effect.⁵⁴ MGE has not carried that burden. The Commission therefore concludes that the events and transactions are not of significant effect.

Further, for an item to be considered extraordinary under the USOA, the item “should be more than approximately 5 percent of income, computed before extraordinary items.”⁵⁵

Although not determinative in this case, it should be noted that MGE’s costs of remediation efforts, through June of 2008, have been

⁵² Section 1.090 RSMo 2000.

⁵³ Webster’s Third New International Dictionary (1961).

⁵⁴ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680 (Mo. App. 2003).

⁵⁵ 18 CFR part 201, general instruction 7.

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approximately 2% of its income and MGE projects that it will incur, through the remainder of this year, what is the equivalent of 8% of its income.

Abnormal and Significantly Different From the Ordinary and Typical Activities of the Company

The Commission has concluded that the activities are not unusual. To now conclude that the same activities are abnormal would be inconsistent. With regard to the activities being significantly different from the ordinary and typical activities of the company, the Commission has determined that cleanup activities are typical for MGE. Although it is not MGE's purpose to remediate FMGP sites, it has necessarily done so since being certificated 14 years ago. The Commission concludes that the remediation of FMGP sites is not abnormal or significantly different from the ordinary and typical activities of the company.

Not Reasonably Expected To Recur in the Foreseeable Future

There is no evidence suggesting that MGE does not expect remediation activities to recur in the foreseeable future. In fact, all of the evidence that is relevant to this point suggests that remediation will certainly recur in the foreseeable future.

The company has a \$3 million budget for remediation costs that are to be incurred in the foreseeable future. Company witnesses testified that the cost are recurring; even to the point of stating that cleanup costs are certain to occur in the near future.

The Commission concludes that it is reasonable to expect remediation costs to recur in the foreseeable future.

DECISION

Having made the above findings of fact and conclusions of law the Commission determines that MGE's costs associated with the remediation of FMGP sites is not extraordinary. The Commission will therefore deny MGE's application for an accounting authority order.

MGE's Motion to Strike

MGE filed a motion to strike portions of OPC's brief. In its motion, MGE argues that OPC has alleged certain facts which have no support in the records. The Commission points out that statements made by OPC in its brief do not change what is in the record. Although the Commission appreciates MGE's effort to bring to light what may be possibly misleading statement made by OPC, the Commission will deny this motion.

THE COMMISSION ORDERS THAT:

1. Missouri Gas Energy's application for an accounting

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authority order to treat as extraordinary costs associated with the cleanup of former manufactured gas plant sites is denied.

2. Missouri Gas Energy's motion to strike portions of the Office of the Public Counsel's brief is denied.

3. This order shall become effective on December 27, 2008.

4. This case shall be closed on December 28, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur and
certify compliance with the provisions
of Section 536.080, RSMo.

NOTE: Another order in this case can be found at page 303.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs
to Increase Its Annual Revenues for Electric Service***

*Case No. ER-2008-0318
Decided December 30, 2008*

Electric §22. The Commission approved a stipulation and agreement that resolved all off-system sales related issues in the underlying rate case.

**ORDER APPROVING STIPULATION AND AGREEMENT
AS TO OFF-SYSTEM SALES RELATED ISSUES**

On December 11, 2008, during the course of the hearing of this case, several parties filed a nonunanimous stipulation and agreement concerning certain issues related to off-system sales. The following parties signed the stipulation and agreement: Union Electric Company, d/b/a AmerenUE; the Staff of the Commission; the Office of the Public Counsel; and the Missouri Industrial Energy Consumers. The stipulation and agreement reflected the agreement of the signatory parties regarding several issues that would otherwise have been the subject of testimony presented to the Commission at the evidentiary hearing conducted from November 20 through December 12, 2008.

The stipulation and agreement resolves all off-system sales issues, including:

a. Off-system sales revenues and margins from energy;

*This case was appealed to the Missouri Court of Appeals (SD) and was affirmed. See 356 SW 3d 293. (Mo. App. S.D. 2011)

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- b. Natural gas and purchased power / market energy prices used to determine purchased power and off-system sales;
- c. Prior period Taum Sauk capacity sales;
- d. Non-Taum Sauk capacity sales;
- e. Current period Taum Sauk capacity sales;
- f. Ancillary Services Revenue; and
- g. Non-asset based (speculative) trading margins.

The stipulation and agreement also resolves all fuel-cost issues except the Revenue Sufficiency Guarantee resettlement issue (also known as the MISO Day 2 Issue) and the Fuel Adjustment Clause issues.

The stipulation and agreement is nonunanimous in that it was not signed by all parties. However, Commission rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a nonunanimous stipulation and agreement. If no party files a timely objection to the stipulation and agreement, then the Commission may treat it as a unanimous stipulation and agreement. More than seven days have now passed since the stipulation and agreement was filed and no party has objected. Therefore, the Commission will treat the stipulation and agreement as a unanimous stipulation and agreement.

After reviewing the stipulation and agreement, the Commission finds that the stipulation and agreement concerning off-system sales related issues should be approved as a resolution of the issues addressed by that stipulation and agreement. In approving this stipulation and agreement, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position regarding these issues and its approval of this stipulation and agreement should not be interpreted as such an endorsement in any future case.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement as to Off-System Sales Related Issues, filed on December 11, 2008, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order.

2. The signatory parties are ordered to comply with the terms of the stipulation and agreement.

3. This order shall become effective on January 8, 2009.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

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Woodruff, Deputy Chief Regulatory Law Judge

NOTE: The stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: Other orders in this case can be found at pages 297, 306, 441, and 443.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs
to Increase Its Annual Revenues for Electric Service***

*Case No. ER-2008-0318
Decided December 30, 2008*

Electric §20. The Commission approved a stipulation and agreement that resolved all fuel adjustment clause tariff rate design issues in the underlying rate case.

Rates §101. The Commission approved a stipulation and agreement that resolved all fuel adjustment clause tariff rate design issues in the underlying rate case.

**ORDER APPROVING STIPULATION AND AGREEMENT AS TO ALL
FAC TARIFF RATE DESIGN ISSUES**

On December 12, 2008, during the course of the hearing of this case, several parties filed a nonunanimous stipulation and agreement concerning fuel adjustment clause (FAC) tariff rate design issues. The following parties signed the stipulation and agreement: Union Electric Company, d/b/a AmerenUE; the Staff of the Commission; the Office of the Public Counsel; the Missouri Industrial Energy Consumers; and Noranda Aluminum, Inc. The stipulation and agreement reflected the agreement of the signatory parties regarding several issues that would otherwise have been the subject of testimony presented to the Commission at the evidentiary hearing conducted from November 20 through December 12, 2008.

If, but only if, the Commission determines that AmerenUE should be permitted to use an FAC, this stipulation and agreement settles all known rate design issues related to AmerenUE's request to implement a FAC and the terms and conditions of the FAC tariff, except that the sharing percentage to be inserted into the $FPA_{(RP)}$ formula in the attached revised FAC tariff will depend on whether an FAC is approved and what sharing percentage is approved by the Commission. In addition, Public Counsel reserves the right to contest whether Factors CPP and OSSR should include all costs and revenues associated with all energy and capacity sales made by AmerenUE, including purely

*This case was appealed to the Missouri Court of Appeals (SD) and was affirmed. See 356 SW 3d 293. (Mo. App. S.D. 2011)

financial transactions. Moreover, Public Counsel does not waive its right to argue that the Commission's FAC rules allow exceptions to the use of historic costs.

The stipulation and agreement is nonunanimous in that it was not signed by all parties. However, Commission rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a nonunanimous stipulation and agreement. If no party files a timely objection to the stipulation and agreement, then the Commission may treat it as a unanimous stipulation and agreement. More than seven days have now passed since the stipulation and agreement was filed and no party has objected. Therefore, the Commission will treat the stipulation and agreement as a unanimous stipulation and agreement.

After reviewing the stipulation and agreement, the Commission finds that the stipulation and agreement as to FAC tariff rate design issues should be approved as a resolution of the issues addressed by that stipulation and agreement. In approving this stipulation and agreement, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position regarding these issues and its approval of this stipulation and agreement should not be interpreted as such an endorsement in any future case.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement as to All FAC Tariff Rate Design Issues, filed on December 12, 2008, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order.
2. The signatory parties are ordered to comply with the terms of the stipulation and agreement.
3. This order shall become effective on January 8, 2009.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation & Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: Other orders in this case can be found at pages 295, 306, 441, and 443.

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In the Matter of the Joint Application of The Empire District Electric Company and Carthage Water & Electric Plant for Approval of a Change in Electrical Supplier for Certain Customers for Reasons in the Public Interest

Case No. EO-2009-0181
Decided December 30, 2008

Electric §4.1. Change of suppliers was in the public interest because it allowed electrical corporation and municipal utility to serve customers more efficiently.

ORDER APPROVING APPLICATION FOR CHANGE OF SUPPLIER

The Missouri Public Service Commission approves an application (“the application”) to change the supplier of electricity to three outdoor advertising signs (“the billboards”) southeast of the intersection of US Highways 71 and Missouri Highway HH in Carthage, Jasper County.

Procedure

On November 13, 2008, The Empire District Electric Company (“Empire”) and Carthage Water & Electric Plant (“the City”) jointly filed the application. The application included affidavits in support of the application from Empire, the City, Lamar Outdoor Advertising (“Lamar”), and Grace Energy Corporation (“Grace”). On December 5, 2008, the Commission’s staff (“Staff”) filed its recommendation and affidavit in favor of the application. The Commission also gave notice of the application to the McCune-Brooks Regional Hospital (“the Hospital”), and gave the Hospital until December 19, 2008, to file a response. The Hospital filed no response.

The Commission convened no hearing on the application for several reasons. First, the statute that creates Empire’s exclusive right to continue serving the billboards does not require a hearing before deciding the application.¹ Also, the current supplier, prospective supplier and billboard owners all favor the application. Further, no person sought a hearing on the application.²

¹ Section 393.106.2. All sections are in the 2007 supplement to the 2000 Revised Statutes of Missouri, except as otherwise noted.

² Moreover, when the law provides a hearing before deciding the application, the waived opportunity for such hearing satisfies the hearing requirement. *State ex rel. Deffenderfer Ent., Inc. v. Public Serv. Comm’n of the State of Mo.*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

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Based on the affidavits of Lamar and Grace ("the billboard owners"), Empire, the City, and Staff, the Commission makes the following findings of fact.

Findings of Fact

1. Empire is an electrical corporation. Empire is current on filings of annual reports and its assessment dues. Empire has no pending or final unsatisfied decision against it from any state or federal court involving customer service or rates within three years of the date of the application's filing.

2. The City is a municipal utility of the City of Carthage, Missouri. The City is not required to file annual reports or pay assessment fees with the Commission. The City has no pending or final unsatisfied decision against it from any state or federal court involving customer service or rates within three years of the date of the application's filing.

3. The City is authorized to provide electric service within, and to certain facilities outside, the city limits of Carthage, Missouri.

The Site

4. U.S. Highway 71 runs north and south. In the City of Carthage, Jasper County, Missouri, U.S. Highway 71 intersects Missouri Route HH ("the intersection"). The billboards are southeast of the intersection. Southwest of the intersection is the Hospital and, further west, a predominantly residential area.

5. The Hospital faces east toward U.S. Highway 71's west outer road. Between the outer road and the front of the Hospital runs Empire's three-phase, 12-kV, distribution line. The distribution line includes three poles; 1,108 feet of 7,200 volt conductor; and crossarms, anchors, and guys ("the facilities"). From the facilities:

- a. West, along the south the boundary of the Hospital and turning north along the Hospital's west boundary, the City runs a circuit to supply the residential area and the Hospital with electricity.
- b. East, across U.S. Highway 71, Empire runs a tap to supply electricity to the billboards.

The billboards are the only structures to which Empire is supplying electric service in that area on the east side of Highway 71.

6. On the east side of Highway 71, for all customers neighboring the billboards, electric service comes from the City. The City has constructed its own highway crossing, extending its service to the east side of U.S. Highway 71. That area has commercial zoning,

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includes a restaurant to which the City recently began providing service, and will be a source of increased demand over time.

Relocation

7. Since the Hospital's construction began, the Hospital has desired to relocate the facilities from the front of the Hospital to the rear of the Hospital for aesthetic purposes ("the relocation"). To accommodate the relocation, the City constructed poles of sufficient height and class to provide sufficient clearance on the west and south sides of the Hospital. The Hospital began operation in 2008.

8. The Hospital asked Empire to perform the relocation, and Empire agreed.

9. Empire also agreed to sell the facilities to the City. The Hospital has agreed to bear the expense of the relocation. The Hospital has also agreed to bear the expense of removing Empire's highway crossing.

The Billboards

10. The relocation would change the cost effectiveness of providing electricity to the billboards. Empire could not maintain service efficiently, and could not extend its facilities as efficiently as the City, because Empire would have to build a new crossing. Because the City already has a crossing in place suitable for supplying the billboards, it is less expensive to change the billboards' electrical supplier from Empire to the City.

11. The City has agreed to extend a line northward to provide electric service to the billboards. The City has also agreed to pay the costs associated with extending its service to the billboards. The billboards' owners agree to the change of supplier.

12. Efficiency, load management and equipment optimization thus favor changing the supplier from Empire to the City.

Conclusions of Law

1. The Commission's jurisdiction includes changing an electrical corporation's right to supply electricity as follows:

The public service commission, upon
application made by an affected party,
may order a change of suppliers [. ³]

A party "affected" by a matter is one "interested therein . . . with respect to any matter determined therein."⁴ Such parties include the suppliers—

³ Section 393.106.2.

⁴ *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State*, 215 S.W.3d 76, 81 (Mo. banc 2007).

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current and prospective—who filed the application, so the Commission has jurisdiction to decide the application.

2. The application is subject to the following standard:

. . . that it is in the public interest for a reason other than a rate differential.^{5]}
The commission's jurisdiction under this section is limited to public interest determinations^{6]}

The Commission's regulation echoes that requirement:

In addition to the requirements of 4 CSR 240-2.060(1), applications for the approval of a change in electrical suppliers shall include:

* * *

(G) The reasons a change of electrical suppliers is in the public interest^{7]}

The public interest includes factors related to "efficient facilities and substantial justice between patrons and public utilities^{8]}"

3. Such factors are present in the application, as Staff's recommendation and the parties' affidavits show. A utility patron—the Hospital—seeks to relocate the facilities, which creates the incentive to change suppliers to the billboards, which is the purpose of the application. The application has the support of Empire, the City, the Hospital, and the billboard owners. All agree that changing the billboards' supplier to the City is better than maintaining the supply from Empire, and have agreed to a division of the expenses. Conditioned on fulfillment of those agreements, the Commission concludes that approving the application is in the public interest.

THE COMMISSION ORDERS THAT:

1. The application is granted subject to the following conditions:
 - a. McCune-Brooks Regional Hospital shall pay the costs associated with the relocation.

⁵ A rate differential is not among the grounds cited in the application or in any supporting affidavit.

⁶ Section 393.106.2. Similar statutes apply to other entities. Section 394.315, RSMo 2000, applies to rural electrical cooperatives. To change from a municipal utility requires the application of a customer under § 91.025.2, RSMo 2000.

⁷ 1 CSR 240-3.140(1).

⁸ Section 386.610, RSMo 2000.

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- b. McCune-Brooks Regional Hospital shall pay the costs associated with removing The Empire District Electric Company's highway crossing.
 - c. The Empire District Electric Company shall perform the relocation.
 - d. The Empire District Electric Company shall sell the facilities at book value to the City.
 - e. Carthage Water & Electric Plant shall extend a line northward to provide electric service to the billboards.
 - f. Carthage Water & Electric Plant shall bear the expense of extending its service to the billboards.
2. This order shall become effective on January 9, 2009.
 3. This case shall be closed on January 10, 2009.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

Jordan, Regulatory Law Judge

**In the Matter of the Application of Missouri Gas Energy, a division
of Southern Union Company, for an Accounting Authority Order
Concerning Environmental Compliance Activities**

*Case No. GU-2007-0480
Decided January 15, 2009*

Accounting §42. In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.

**ORDER CORRECTING REPORT AND ORDER AND
ORDER DENYING APPLICATION FOR REHEARING**

The Missouri Public Service Commission issued its Report and Order on December 17, 2008, denying Missouri Gas Energy, a division of Southern Union Company's request for an accounting authority order. Missouri Gas Energy filed a motion for reconsideration and application

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for rehearing on December 19.¹

In denying MGE's request for an accounting authority order, the Commission concluded that the costs for which MGE sought special accounting treatment were not extraordinary. In order to have been extraordinary, such costs must have, among other things, occurred infrequently. In support of its argument that the cost infrequently occur, MGE asserted that costs for each of the separate sites should be considered separately.² Addressing this point, the Commission, in part, relied on the premise that there was no evidence treating, as separate, costs for various cleanup sites and activities at each site.

Although MGE makes several arguments to support its application for rehearing, it notably points out that the Commission erroneously found that there was "no evidence treating the remediation costs as separate sites and activities"³ A review of Exhibit 11, page 1, shows a general history of costs associated with MGE's cleanup efforts. However, on subsequent pages of the exhibit, specific costs are in fact delineated, separating costs between sites and activities as MGE points out in its application for rehearing.

Although not specifically a "finding" as MGE contests, the Commission does use this flawed premise in its analysis and therefore recognizes MGE's point. However, even considering MGE's point, the conclusion reached by the Commission is not altered.

Relevant to this issue, the following is set out in the definition of an extraordinary item:

In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.⁴

For purposes of this case, the "single event" is the Comprehensive Environmental Response, Compensation and Liability Act of Congress (CERCLA) and the "series of related transactions" arising from this event are MGE's separately listed costs at each site. As required by the definition of "extraordinary items," these related transactions should be considered in the aggregate.

¹ Because motions for reconsideration relate only to procedural and interlocutory orders, the Commission will treat MGE's filing only as an application for rehearing under Commission rule 4 CSR 240-2.160.

² MGE's post hearing brief, p. 10.

³ See Report and Order, page 11, under the issue of "Infrequent Occurrence."

⁴ 18 CFR part 201, General Instruction No. 7.

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Furthermore, that MGE has requested deferred treatment, in the aggregate and not site-by-site, for all of the environmental costs arising from CERCLA is evidence that these costs should be treated in the aggregate. Therefore, recognizing as true that MGE has separately set out the costs of remediation for the various sites and items, the Commission should nevertheless treat these items in the aggregate.

The remaining arguments presented by MGE do not present anything new for the Commission to consider. However, to accurately reflect how MGE has recorded its costs of remediation, the Commission shall correct its Report and Order by abandoning the premise “that there is no evidence treating the remediation costs as separate sites and activities.” Rather, the Commission sets out the above reasoning to address MGE’s contention that costs are treated separately.

Section 386.500.1, RSMo 2000, provides that the Commission shall grant an application for rehearing if “in its judgment sufficient reason therefor be made to appear.” The Commission finds that MGE does not present sufficient reason to grant its application and will therefore deny MGE’s request.

THE COMMISSION ORDERS THAT:

1. The Commission’s Report and Order is corrected as set out in the body of this order.
2. Missouri Gas Energy, a division of Southern Union Company’s Application for Rehearing is denied.
3. This order shall become effective upon issuance.
4. This case shall be closed on January 16, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

NOTE: Another order in this case can be found at page 285.

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**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs
to Increase Its Annual Revenues for Electric Service***

Case No. ER-2008-0318

Decided January 27, 2009

Electric §29. Neither the DCF, Risk Premium, nor CAPM methods for estimating a company's fair rate of return on equity is any more "correct" than any other method in all circumstances and analysts balance their use of all three methods to reach a recommended return on equity.

Electric §29. The average allowed return on equity awarded to electric utilities provides a reasonableness test for the recommendations offered by the rate of return on equity experts.

Electric §29. The Commission found the use of a quarterly DCF model to be preferable to the use of an annual DCF model in a DCF analysis.

Electric §29. The Commission found the return on equity advocated by Staff's witness to be unreasonably low and not to be credible.

Electric §43. The Commission granted AmerenUE an AAO regarding ice storm restoration costs and ordered that a five-year amortization of those costs begin at the date rates established in this rate case went into effect.

Expense §67. AmerenUE was not required to recognize as deferred taxes the amount of its uncertain tax positions is ultimately expects to pay with interest to the IRS.

Rates §101. AmerenUE's fuel costs were substantial, beyond the control of management, and volatile in amount, thus meeting the previously established three-part test for justification for a fuel adjustment clause.

Rates §101. AmerenUE was allowed to implement a fuel adjustment clause because it could not otherwise have a sufficient opportunity to earn a fair return on equity.

Rates §101. AmerenUE was allowed to implement a fuel adjustment clause so that it would be able to compete for capital with other electric utilities that already have a fuel adjustment clause.

Rates §101. AmerenUE was allowed to implement a fuel adjustment clause with a 95% pass through provision.

Expense §35. The costs associated with AmerenUE's preparation and filing of the Callaway 2 application are properly treated as Construction Work in Progress (CWIP) and as such may not be included in AmerenUE's rate base until the Callaway 2 plant is fully operational and used for service.

*This case was appealed to the Missouri Court of Appeals (SD) and affirmed. See 356 SW3d 293. (Mo. App. S.D. 2011)

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Expense §64. The Commission will approve company offered incentive compensation plans if the overall plan is appropriate, but will not attempt to manage the details of that plan by disallowing a portion of the cost of that plan.

Depreciation §1. It would be inappropriate to adjust a few depreciation rates without looking at all depreciation rates in a complete depreciation study.

Expense §37. It would be inappropriate to adjust a few depreciation rates without looking at all depreciation rates in a complete depreciation study.

Expense §39. The Commission has no authority to compel a utility's shareholders to make a charitable contribution.

Expense §28. The Commission does not wish to review the appropriateness of recovery through rates of the cost of individual advertisements. If on balance an advertising campaign is acceptable for recovery in rates, then the cost of individual advertisements within that campaign should be recoverable.

Rates §118. The Peak and Average Demand allocation method used by Staff is inherently flawed as it double counts the average demand of customer classes, resulting in customers with higher load factor, in other words, industrials, being allocated an inequitable share of production plant investment.

APPEARANCES

Thomas M. Byrne, Managing Assoc. General Counsel, and **Wendy K. Tatro**, Asst. General Counsel, Ameren Services Company, P.O. Box 66149, 1901 Chouteau Ave., St. Louis, Missouri 63103;

James B. Lowery, Attorney at Law, Smith Lewis, LLP, P.O. Box 918, Suite 200, City Centre Building, 111 South Ninth St. Columbia, Missouri 65205-0918; and

James M. Fischer, Attorney at Law, Fischer & Dority, 101 Madison, Suite 400, Jefferson City, Missouri 65101.

For Union Electric Company, d/b/a AmerenUE.

Kevin Thompson, General Counsel, **Steven Dotthiem**, Chief Deputy General Counsel, **Steven Reed**, Chief Litigation Attorney, **Nathan Williams**, Deputy General Counsel, **Sarah Kliethermes**, Assistant General Counsel, and **Eric Dearmont**, Assistant General Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102

For the Staff of the Missouri Public Service Commission.

Lewis Mills, Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102

For the Office of the Public Counsel and the Public.

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Shelley Ann Woods, Assistant Attorney General, P.O. Box 899,
Jefferson City, Missouri 65102
For the Missouri Department of Natural Resources.

Stuart W. Conrad, Attorney at Law, Finnegan, Conrad & Peterson, L.C.,
3100 Broadway, Suite 1209, Kansas City, Missouri 64111, and **David**
Woodsmall, Attorney at Law, Finnegan, Conrad & Peterson, L.C., 428
East Capitol, Suite 300, Jefferson City, Missouri 65101
For Noranda Aluminum, Inc.

Michael C. Pendergast, Vice President and Associate General
Counsel, Laclede Gas Company, 720 Olive Street, Room 1520, St.
Louis, Missouri 63101.
For Laclede Gas Company.

H. Todd Iveson, Assistant Attorney General, and **Robert Carlson**,
Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri
65102.
For The State of Missouri.

Henry B. Robertson, Attorney at Law, Great Rivers Environmental Law
Center, 705 Olive Street, Suite 614, St. Louis, Missouri 63101.
For Missouri Coalition for the Environment and Missourians for Safe
Energy.

Diana Vuyksteke, Attorney at Law, Bryan Cave, LLP, 211 N.
Broadway, Suite 3600, St. Louis, Missouri 63102.
For Missouri Industrial Energy Consumers.

Lisa C. Langeneckert, Attorney at Law, Sandberg, Phoenix & Von
Gontard, P.C., One City
Centre, 15th Floor, St. Louis, Missouri 63101-1880.
For Missouri Energy Group.

John B. Coffman, Attorney at Law, John B. Coffman, LLC, 871 Tuxedo
Blvd, St. Louis, Missouri 63119-2044.
For AARP

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Michael A. Evans, Attorney at Law, Hammond, Shinnars, Turcotte, Larrew and Young, P.C. 7730 Carondelet Ave., Suite 200, St. Louis, Missouri 63105.

For International Brotherhood of Electrical Workers Locals 2, 309, 649, 702, 1439, 1455, AFL-CIO and International Brotherhood of Operating Engineers Local 148, AFL-CIO.

Rick D. Chamberlain, Attorney at Law, Behrens, Taylor, Wheeler & Chamberlain, 6 N.E. 63rd, Suite 400, Oklahoma City, Oklahoma 73102, and

Koriambanya S. Carew, Attorney at Law, Baker Sterchi Cowden & Rice, LLC, 2400 Pershing Road, Suite 500, Kansas City, Missouri 64108.

For The Commercial Group.

DEPUTY CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This order allows AmerenUE to increase the revenue it may collect from its Missouri customers by approximately \$162.6 million, based on the data contained in the True-up Reconciliation filed by the Missouri Public Service Commission Staff on January 9, 2009.

Procedural History

On April 4, 2008, Union Electric Company, d/b/a AmerenUE filed tariff sheets designed to implement a general rate increase for electric

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service. The tariff would have increased AmerenUE's annual electric revenues by approximately \$251 million. The tariff revisions carried an effective date of May 4, 2008.

By order issued on April 7, 2008, the Commission suspended AmerenUE's tariff until March 1, 2009, the maximum amount of time allowed by the controlling statute.¹ In the same order, the Commission directed that notice of AmerenUE's tariff filing be provided to interested parties and the public. The Commission also established April 28 as the deadline for submission of applications to intervene. The following parties filed applications and were allowed to intervene: Noranda Aluminum, Inc.; The State of Missouri; The International Brotherhood of Electrical Workers Locals 2, 309, 649, 702, 1439, and 1455, AFL-CIO and International Union of Operating Engineers Local 148 AFL-CIO (collectively the Unions); The Missouri Industrial Energy Consumers (MIEC);² The Missouri Energy Group (MEG);³ The Missouri Department of Natural Resources; Laclede Gas Company; The Consumers Council of Missouri; AARP; The Commercial Group;⁴ and Missouri Coalition for the Environment and Missouri Nuclear Weapons Education Fund, d/b/a Missourians for Safe Energy.

On May 29, 2008, the Commission established the test year for this case as the 12- month period ending March 31, 2008, with certain pro forma adjustments through September 30, 2008, trued-up as of September 30, 2008. In its May 29 order, the Commission established a procedural schedule leading to an evidentiary hearing.

In September, the Commission conducted fourteen local public hearings at various sites around AmerenUE's service area. At those hearings, the Commission heard comments from AmerenUE's customers and the public regarding AmerenUE's request for a rate increase.

In compliance with the established procedural schedule, the parties prefiled direct, rebuttal, and surrebuttal testimony. The evidentiary hearing began on November 20, and continued on November 21, 24 and

¹ Section 393.150, RSMo 2000.

² The members of MIEC are Anheuser-Busch Companies, Inc.; BioKyowa, Inc.; The Boeing Company; Chrysler; Doe Run; Enbridge; Explorer Pipeline; GKN Aerospace; General Motors Corporation; Hussmann Corporation; JW Aluminum; Monsanto; Pfizer; Precoat Metals; Proctor & Gamble Company; Nestlé Purina PetCare; Solutia; and U.S. Silica Company.

³ The members of MEG are Barnes-Jewish Hospital; Buzzi Unicem USA, Inc.; and SSM HealthCare.

⁴ The members of the Commercial Group are JCPenney Corporation and Wal-Mart Stores East, LP.

25, as well as December 1-4 and December 10-12. The parties indicated they had no contested true-up issues and Commission cancelled the true-up hearing scheduled for January 6 and 7, 2009. The parties filed post-hearing briefs on January 8. Based on the true-up reconciliation filed by Staff on January 5, 2009, AmerenUE's rate increase request has been reduced to \$187,829,805. That same reconciliation indicates that each party has taken positions that will allow AmerenUE a rate increase of at least \$66 million.

The Partial Stipulations and Agreements

During the course of the evidentiary hearing, various parties filed two nonunanimous partial stipulations and agreements resolving several issues that would otherwise have been the subject of testimony at the hearing. No party opposed those partial stipulations and agreements. As permitted by its regulations, the Commission treated the unopposed partial stipulations and agreements as unanimous.⁵ After considering both stipulations and agreements, the Commission approved them as a resolution of the issues addressed in those agreements.⁶ The issues that were resolved in those stipulations and agreements will not be further addressed in this report and order, except as they may relate to any unresolved issues.

During the course of the hearing, the Office of the Public Counsel, Noranda, MIEC, MEG, and the Commercial Group filed a third non-unanimous stipulation and agreement that would have resolved various class cost of service and rate design issues. The Commission's Staff opposed that non-unanimous stipulation and agreement and as provided in the Commission's rules, the Commission will consider that stipulation and agreement to be merely a position of the signatory parties to which no party is bound.⁷ The issues that were the subject of that stipulation and agreement shall be determined in this report and order.

⁵ Commission Rule 4 CSR 240-2.115(C).

⁶ The Commission issued an *Order Approving Stipulation and Agreement as to All FAC Tariff Rate Design Issues* and an *Order Approving Stipulation and Agreement as to Off-System Sales Related Issues* on December 30, 2008.

⁷ Commission Rule 4 CSR 240-2.115(2)(D).

Overview

AmerenUE is an investor-owned utility providing retail electric service to large portions of Missouri, including the St. Louis Metropolitan area. AmerenUE has approximately 1.2 million retail electric customers in Missouri, more than 1 million of which are residential customers.⁸ AmerenUE also operates a natural gas utility in Missouri but the rates it charges for natural gas are not at issue in this case.

AmerenUE began the rate case process when it filed its tariff on April 4, 2008. In doing so, AmerenUE asserted it was entitled to increase its retail rates by \$250.8 million per year, an increase of approximately 12.1 percent.⁹ AmerenUE set out its rationale for increasing its rates in the direct testimony it filed along with its tariff on April 4. In addition to its filed testimony, AmerenUE provided work papers and other detailed information and records to the Staff of the Commission, Public Counsel, and to the intervening parties. Those parties then had the opportunity to review AmerenUE's testimony and records to determine whether the requested rate increase was justified.

This is a complex case with many issues and it is easily understandable why the parties could, in fact, disagree on a multitude of those issues. Fortunately, the parties were able to resolve their differences on many issues. Where the parties disagreed, they prefiled written testimony for the purpose of raising those issues to the attention of the Commission. All parties were given an opportunity to prefile three rounds of testimony – direct, rebuttal, and surrebuttal. The process of filing testimony and responding to the testimony filed by other parties revealed areas of agreement that resolved some issues and areas of disagreement that revealed new issues. On November 12, the parties filed a Joint Statement of Issues listing the issues they asked the Commission to resolve.

As previously indicated, a number of the identified issues were resolved by the approved partial stipulations and agreements and will not be further addressed in this report and order. The remaining issues will be addressed in turn.

⁸ Voss Direct, Ex. 1, Page 2, Lines 21-22.

⁹ Voss Direct, Ex. 1, Page 3, Lines 17-18.

Conclusions of Law Regarding Jurisdiction

AmerenUE is a public utility, and an electrical corporation, as those terms are defined in Section 386.020(43) and (15), RSMo (Supp. 2008). As such, AmerenUE is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Section 393.140(11), RSMo 2000, gives the Commission authority to regulate the rates AmerenUE may charge its customers for electricity. When AmerenUE filed a tariff designed to increase its rates, the Commission exercised its authority under Section 393.150, RSMo 2000, to suspend the effective date of that tariff for 120 days beyond the effective date of the tariff, plus an additional six months.

Conclusions of Law Regarding the Determination of Just and Reasonable Rates

In determining the rates AmerenUE may charge its customers, the Commission is required to determine that the proposed rates are just and reasonable.¹⁰ AmerenUE has the burden of proving its proposed rates are just and reasonable.¹¹

In determining whether the rates proposed by AmerenUE are just and reasonable, the Commission must balance the interests of the investor and the consumer.¹² In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held as follows:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.¹³

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

¹⁰ Section 393.150.2, RSMo 2000.

¹¹ *Id.*

¹² *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).

¹³ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.¹⁴

The Supreme Court has further indicated:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity

¹⁴ *Id.* at 692-93.

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of the enterprise, so as to maintain its credit and to attract capital.¹⁵

In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.¹⁶

Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.¹⁷

The Rate Making Process

The rates AmerenUE will be allowed to charge its customers are based on a determination of the company's revenue requirement. AmerenUE's revenue requirement is calculated by adding the company's operating expenses, its depreciation on plant in rate base, taxes, and its rate of return multiplied by its rate base. The revenue requirement can be expressed as the following formula:

$$\text{Revenue Requirement} = E + D + T + R(V-AD+A)$$

Where: E = Operating expense requirement

D = Depreciation on plant in rate base

¹⁵ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

¹⁶ *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

¹⁷ *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).

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T = Taxes including income tax related to return

R = Return requirement

$(V-AD+A)$ = Rate base

For the rate base calculation:

V = Gross Plant

AD = Accumulated depreciation

A = Other rate base items

All parties accept the basic formula. Disagreements arise over the amounts that should be included in the formula.

The Issues

1. Rate of Return

Introduction:

This issue concerns the rate of return AmerenUE will be authorized to earn on its rate base. Rate base includes things like generating plants, electric meters, wires and poles, and the trucks driven by AmerenUE's repair crews. In order to determine a rate of return, the Commission must determine AmerenUE's cost of obtaining the capital it needs.

a. Capital Structure

Findings of Fact:

The relative mixture of sources AmerenUE uses to obtain the capital it needs is its capital structure. All parties agree that AmerenUE's actual capital structure should be used for purposes of establishing its rates in this case. In his rebuttal testimony, AmerenUE's witness, Michael G. O'Bryan described AmerenUE's actual capital structure as of March 31, 2008 as:

Long-Term Debt	45.532%
Short-Term Debt	00.722%
Preferred Stock	01.737%
Common Equity	52.009% ¹⁸

¹⁸ O'Bryan Rebuttal, Ex. 8, Schedule MGO-RE1.

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That structure is slightly different from the actual capital structure as of March 31, 2008 that O'Bryan described in his supplemental direct testimony. At that time, O'Bryan indicated the common equity component made up 50.928% of the structure.¹⁹ In his rebuttal testimony, O'Bryan explained that the adjustment to common equity had occurred because he had previously adjusted the March 31 common equity balance to remove any earnings related to unregulated subsidiaries. AmerenUE had historically made that adjustment to remove any earnings related to unregulated subsidiaries, so that unregulated earnings would not have an impact on the company's regulated capital structure.²⁰ As of March 31, AmerenUE no longer owned the subsidiaries, so the adjustment was no longer necessary.²¹ As a result, O'Bryan's adjustment to common equity in his rebuttal testimony was intended simply to correct a mistake in his description of the actual capital structure contained in his supplemental direct testimony.

If the retained earnings had already been removed from AmerenUE's March 31 capital structure, as they should have been since the company no longer owned the unregulated subsidiaries, O'Bryan's original adjustment to remove costs that were not there would be unnecessary, and would understate the proportion of common equity in AmerenUE's actual capital structure. O'Bryan's decision to reverse his previous adjustment would increase AmerenUE's revenue requirement by \$7.6 million.²²

In his surrebuttal testimony, Staff's witness, Stephen Hill, accused O'Bryan of improperly adding back to the capital structure the retained earnings of unregulated subsidiaries that he had previously correctly removed from the capital structure.²³ Hill and O'Bryan agree that the retained earnings of the unregulated subsidiaries do not belong in the capital structure. The real question is whether those retained earnings are in fact in AmerenUE's capital structure as of March 31, 2008.

Hill does not offer any independent evidence or calculation to show that retained earnings of unregulated subsidiaries are in the March 31, 2008 capital structure described by O'Bryan in his rebuttal testimony. Instead, he seizes on a line in O'Bryan's rebuttal testimony that says AmerenUE's UES month-end March 2008 accounts were corrected to a zero

¹⁹ O'Bryan Supplemental Direct, Ex. 7, Schedule MGO-E5.

²⁰ O'Bryan Rebuttal, Ex. 8, Page 8, Lines 1-6.

²¹ O'Bryan Supplemental Direct, Ex. 7, Page 3, Lines 20-21.

²² Weiss Rebuttal, Ex. 12, Page 16, Lines 8-14.

²³ Hill Surrebuttal, Ex. 205, Page 8, Lines 4-8.

balance subsequent to the filing of O'Bryan's supplemental direct testimony.²⁴ Hill reasons that if the retained earnings were not removed from the account until after O'Bryan filed his supplemental direct testimony, then they must have still been in the account at the time O'Bryan originally calculated the capital structure he reported in his supplemental direct testimony. Therefore, O'Bryan would still need to make his adjustment to remove the retained earnings from the capital structure.

Considering it is worth \$7.6 million, the parties paid amazingly little attention to this issue. Neither Hill nor O'Bryan were effectively cross-examined about this issue at the hearing, and neither Staff nor AmerenUE effectively addressed the issue in their briefs.

Hill's position is understandable as a matter of bare logic. However, it does not account for the likelihood that O'Bryan in fact used the corrected account balance when he reported the revised capital structure in his rebuttal testimony, even though he does not report that fact in his testimony. Given the paucity of evidence on this issue, the Commission finds O'Bryan's representations to be more credible than the theory offered by Hill. Accordingly, the Commission finds that the correct capital structure is that described by O'Bryan in his rebuttal testimony.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The Commission finds that AmerenUE's actual capital structure as of March 31, 2008, is

Long-Term Debt	45.532%
Short-Term Debt	00.722%
Preferred Stock	01.737%
Common Equity	52.009%

b. Return on Equity

Introduction:

Determining an appropriate return on equity is without a doubt the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine

²⁴ O'Bryan Rebuttal, Ex. 8, Page 8, Lines 12-13.

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because their rate of return is specified within the instruments that create them. In contrast, in determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in AmerenUE rather than in some other investment opportunity. As a result, the Commission cannot simply find a rate of return on equity that is unassailably scientifically, mathematically, or legally correct. Such a "correct" rate does not exist. Instead, the Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for AmerenUE's ratepayers. In order to obtain guidance about the appropriate rate of return on equity, the Commission considers the testimony of expert witnesses.

Four financial analysts offered recommendations regarding an appropriate return on equity in this case. Dr. Roger A. Morin testified on behalf of AmerenUE. Dr. Morin is Emeritus Professor of Finance at Robinson College of Business, Georgia State University, and Professor of Finance for Regulated Industry at the Center for the Study of Regulated Industry at Georgia State University. He holds a Ph.D. in Finance and Econometrics from the Wharton School of Finance, University of Pennsylvania.²⁵ He recommends the Commission allow AmerenUE a return on equity of 10.9 percent if AmerenUE is allowed to establish a fuel adjustment clause.²⁶ If AmerenUE is not allowed to establish a fuel adjustment clause, Dr. Morin recommends a return on equity of 11.15 percent.²⁷

Stephen G. Hill testified on behalf of Staff. Hill is self-employed as a financial consultant, specializing in financial and economic issues in regulated industries. He has earned a Masters in Business Administration from Tulane University.²⁸ Hill recommends the Commission allow AmerenUE a return on equity of 9.5 percent, assuming the company is not allowed to establish a fuel adjustment clause.²⁹ If

²⁵ Morin Direct, Ex. 3, Page 1, Lines 8-18.

²⁶ Morin Direct, Ex. 3, Page 65, Lines 7-16.

²⁷ Morin Direct, Ex. 3, Page 71, Lines 10-13.

²⁸ Hill Direct, Ex. 203, Page 1, Lines 7-15.

²⁹ Hill Direct, Ex. 203, Page 44, Lines 10-12.

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AmerenUE were allowed to establish a fuel adjustment clause, Hill's recommended return on equity would drop to below 9.375 percent.³⁰

Michael Gorman testified on behalf of MIEC. Gorman is a consultant in the field of public utility regulation.³¹ He holds a Masters in Business Administration with a concentration in Finance from the University of Illinois at Springfield.³² Gorman recommends the Commission allow AmerenUE a return on equity of 10.2 percent.³³ That rate of return is based on AmerenUE's current level of risk without a fuel adjustment clause. If AmerenUE were allowed to establish a fuel adjustment clause, Gorman would reduce his recommendation by 20 or 25 basis points, resulting in a recommended rate of return of 9.95 or 10.0 percent.³⁴

Finally, Billie Sue LaConte testified on behalf of MEG. LaConte is a consultant in the field of public utility economics and regulation.³⁵ She holds a M.B.A. in finance from the John M. Olin School of Business at Washington University, St. Louis, Missouri. LaConte recommends the Commission allow AmerenUE a return on equity of 10.2 percent without a fuel adjustment clause, or 10.0 percent if a fuel adjustment clause is established.³⁶

Findings of Fact:

A utility's cost of common equity is the return investors expect, or require, to make an investment in that company.³⁷ Financial analysts use variations on three generally accepted methods to estimate a company's fair rate of return on equity. The Discounted Cash Flow (DCF) method assumes the current market price of a firm's stock is equal to the discounted value of all expected future cash flows. The Risk Premium method assumes that all the investor's required return on an equity investment is equal to the interest rate on a long-term bond plus an additional equity risk premium to compensate the investor for the risks of investing in equities compared to bonds. The Capital Asset Pricing Method (CAPM) assumes the investor's required rate of return on equity is

³⁰ Hill Direct, Ex. 203, Page 44, Lines 2-4.

³¹ Gorman Direct, Ex. 600, Page 1, Line 5.

³² Gorman Direct, Ex. 600, Appendix A, Page 1, Lines 10-12.

³³ Gorman Direct, Ex. 600, Page 2, Lines 5-7.

³⁴ Transcript, Page 543, Lines 1-9, and Page 548, Lines 2-25.

³⁵ LaConte Direct, Ex. 650, Page 1, Line 4.

³⁶ LaConte Direct, Ex. 650, Page 2, Lines 3-4.

³⁷ Gorman Direct, Ex. 600, Page 10, Lines 4-5.

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equal to a risk-free rate of interest plus the product of a company-specific risk factor, beta, and the expected risk premium on the market portfolio. No one method is any more “correct” than any other method in all circumstances. Analysts balance their use of all three methods to reach a recommended return on equity. In the words of Dr. Morin, what financial analysts do is a “scientific art”, based on a solid economic foundation, but still dependent upon the analyst’s judgment.³⁸

Before examining the analyst’s use of these various methods to arrive at a recommended return on equity, it is important to look at another number. For the first nine months of 2008, the average return on equity awarded to electric utilities in this country was 10.51 percent, as reported by Regulatory Research Associates. That figure was up from an average of 10.36 percent for calendar year 2007.³⁹ That overall average number includes all electric utilities, some of which are “wires only” utilities in restructured states that provide only distribution services and do not own generation assets. Such utilities tend to be less risky and generally receive lower authorized returns on equity. If the “wires only” utilities are eliminated from the average, the average allowed return on equity for integrated utilities, such as AmerenUE, was 10.62 percent. For Midwest integrated electric utilities⁴⁰, that average return on equity rose to 10.71%.⁴¹

The Commission mentions the average allowed return on equity not because the Commission should, or would slavishly follow the national average in awarding a return on equity to AmerenUE. However, AmerenUE must compete with other utilities all over the country for the same capital. Therefore, the average allowed return on equity provides a reasonableness test for the recommendations offered by the return on equity experts.

In AmerenUE’s last rate case, the Commission bemoaned the tendency of return on equity witnesses to race to extreme positions instead of offering a balanced analysis that could aid the Commission in its evaluation of the proper return on equity.⁴² In this case, the experts have generally done a better job of offering a balanced analysis and the parties

³⁸ Transcript, Page 385, Lines 16-23.

³⁹ Ex. 60.

⁴⁰ “Integrated” or “vertically-integrated” is an industry-specific term commonly used to refer to utilities that own their own generation, transmission and distribution system. An electric utility that only owns a distribution system or possibly owns some transmission in connection with a distribution system is commonly referred to as a “wires only” company.

⁴¹ Morin Rebuttal, Ex. 4, Page 5, Lines 5-18.

⁴² *In the Matter of Union Electric Company d/b/a AmerenUE’s Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 42.

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are to be commended. Other than Mr. Hill's recommended 9.5 percent return on equity, the recommendations of the other parties are separated by only 70 basis points, and all of those recommendations are within 50 basis points of the reported average return on equity for either vertically-integrated utilities or all utilities.

In evaluating the recommendations of the experts, the Commission will look first at the recommendation offered by Michael Gorman, the witness for MIEC. Gorman utilized a constant growth DCF model to arrive at an average return on equity of 11.86 percent.⁴³ He also utilized a two-stage DCF model that showed an average return on equity of 9.73 percent.⁴⁴ Gorman's use of a multi-stage DCF indicated an average return on equity of 9.89 percent.⁴⁵ Gorman also used a Risk Premium model to arrive at a return on equity in a range between 10.25 percent and 10.66 percent, with a midpoint estimate of 10.46 percent.⁴⁶ Gorman's use of a Capital Asset Pricing Model (CAPM) showed an estimated range of return on equity of 10.63 percent to 10.64 percent, with a midpoint of 10.63 percent.⁴⁷

The results of Gorman's various methods are summarized in the following chart:

Method	Resulting Return on Equity
Constant Growth DCF	11.86%
Two-Stage Growth DCF	9.73%
Multi-Stage DCF	9.89%
Risk Premium	10.46%
CAPM	10.63%
Average of Five Methods	10.51%

⁴³ Gorman Direct, Ex. 600, Page 18, Lines 9-16.

⁴⁴ Gorman Direct, Ex. 600, Page 26, Lines 8-15.

⁴⁵ Gorman Direct, Ex. 600, Page 27, Lines 16-22.

⁴⁶ Gorman Direct, Ex. 600, Page 31, Lines 1-2.

⁴⁷ Gorman Direct, Ex 600, Page 36, Lines 6-10.

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However, Gorman chose to ignore the results of his constant growth DCF model in making his recommended return on equity. The results upon which he did rely are summarized in this chart:

Method	Resulting Return on Equity
Two-Stage Growth DCF	9.73%
Multi-Stage DCF	9.89%
Risk Premium	10.46%
CAPM	10.63%
Average of Four Methods	10.2%

Gorman then recommended a return on equity of 10.2 percent, which is the midpoint of his estimated return on equity range of 9.81 percent to 10.55 percent.⁴⁸

Gorman explains that he decided to ignore the results of his constant growth DCF because he found the results unreasonable and believes they represent an inflated return for AmerenUE.⁴⁹ The average 3-5 year growth rates for his three proxy groups are 6.80 percent, 7.25 percent, and 8.03 percent. He believes these growth rates are too high to be a rational estimate of the proxy groups' long-term sustainable growth, because they would exceed the growth rate of the overall US economy.⁵⁰

For his two-stage growth DCF model, Gorman uses a published nominal 5-year and 10-year Gross Domestic Product growth rate of 5.0 percent and 4.8 percent to limit the long-term growth estimate of his proxy groups.⁵¹ However, Gorman used these 5 and 10 year growth estimates improperly to model the historical long-term growth of the economy as a whole.⁵² If instead, Gorman had used the 6.0 percent estimate of long-term US GDP growth found in Morningstar's *Stocks, Bond, Bills and Inflation 2008 Yearbook Valuation Edition*, his two-stage DCF model would have been raised by approximately 100-120 basis points,

⁴⁸ Gorman Direct, Ex. 600, Page 37, Lines 1-6.

⁴⁹ Gorman Direct, Ex. 600, Page 18, Lines 19-20.

⁵⁰ Gorman Direct, Ex. 600, Page 18-9, Lines 19-23, 1-13.

⁵¹ Gorman Direct, Ex. 600, Page 25, Lines 14-22.

⁵² Morin Rebuttal, Ex. 4, Page 39-40, Lines 22-23, 1-3.

putting his estimates in the 10.7 percent to 10.9 percent range.⁵³ Making the same adjustment to his multi-stage DCF model would raise the results of that model into the 10.9 percent to 11.1 percent range.⁵⁴

The Commission will not attempt to recalculate Gorman's two-stage and multi-stage DCF models using different inputs, but the problems with those models illustrate the desirability of considering his model that produces a relatively high return on equity as a balance to his DCF models that show a relatively low return on equity. In that way, the possibly unreasonable impact of one model is counterbalanced by other models. There simply is no good reason to ignore the results of Gorman's constant growth DCF.

As previously indicated, if the result of Gorman's constant growth DCF model is included with the results of his other models, the average result is 10.51 percent. That result should be further adjusted upward because the proxy groups Gorman uses are all, on average, less risky than AmerenUE in that they have average bond ratings two grades higher than the bond ratings assigned to AmerenUE by two widely-used credit rating agencies – Standard & Poor and Moody's.⁵⁵

In the recent Empire rate case, the Commission faced the exact same scenario and noted the difference between a BBB- rating and a BBB+ rating can add between 25 and 50 basis points to a reasonable return on equity.⁵⁶ Ultimately, the Commission settled on a 25 basis point upward adjustment to Gorman's recommended return on equity to recognize the increased risk.⁵⁷

AmerenUE is a much different utility from Empire in that AmerenUE has a higher portion of equity in its capital structure.⁵⁸ Less debt proportionately means that the utility is less risky. Accordingly, the

⁵³ Morin Rebuttal, Ex 4, Page 40, Lines 11-21.

⁵⁴ Morin Rebuttal, Ex. 4, Page 41, Lines 1-5.

⁵⁵ Gorman Direct, Ex. 600, Schedule MPG-3.

⁵⁶ *In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, Case No. ER-2008-0093 July 30, 2008, Page 20.

⁵⁷ *In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, Case No. ER-2008-0093 July 30, 2008, Page 21.

⁵⁸ In the Empire Report and Order, the Commission found that the percentage of common equity in Empire's capital structure was 50.78 percent. *In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, Case No. ER-2008-0093 July 30, 2008, Page 10.

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Commission finds that in this case a 20 basis point adjustment of ROE is necessary to recognize the difference for utility bond ratings. That brings Gorman's recommended return on equity up to 10.71 percent.

One more adjustment to Gorman's recommended return on equity is appropriate. Gorman used an annualized quarterly dividend payment in calculating his DCF analyses.⁵⁹

AmerenUE as well as the overwhelming majority of traditional vertically-integrated electric utilities pay dividends quarterly, not annually. This distinction is important because the conventional DCF model does not account for the compounding of interest (earnings) investors receive and expect in the real world. So, it is more appropriate to use a quarterly DCF model.

At the hearing, Dr. Morin further explained that the use of the annual DCF model is appropriate in jurisdictions that use a forward test year to avoid being overly generous to the company. However, in a jurisdiction such as Missouri that uses a historical test year, the quarterly test year is more appropriate.⁶⁰ Morin indicated the difference between the quarterly and the annual DCF model would "definitely" add 20 basis points to a return on equity recommendation.⁶¹ However, Morin's analysis does not contemplate the greater amount of equity in AmerenUE's capital structure referenced by the Commission earlier. Therefore, the Commission finds that only a five basis point adder is appropriate in this case.

Before finishing the analysis of Mr. Gorman's testimony, the Commission takes notice that this is the second consecutive case where the Commission has made an upward adjustment for return on equity using the quarterly dividends DCF model. Since Ameren does pay quarterly dividends, it is appropriate for this Commission to require the PSC Staff to use the quarterly dividend method when calculating return on equity using the DCF model in future rate cases. Moreover, if Staff does not agree with that approach in succeeding rate cases, Staff needs to make a more compelling argument grounded in economic reality as to why the Commission should relieve them of this obligation.

The Commission finds Gorman's recommended return on equity using the DCF model as adjusted above is the most appropriate return on equity for AmerenUE. Therefore, Ameren's authorized return on

⁵⁹ Gorman Direct, Ex. 600, Page 27, Lines 13-14.

⁶⁰ Transcript, Page 433-434, Lines 19-25, 1-12.

⁶¹ Transcript, Page 435, Lines 2-6.

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equity should be 10.76 percent. However, the Commission's analysis does not end there.

That return on equity is also supported by a necessary adjustment to Gorman's bond yield plus risk premium analysis. That analysis is based on the difference between a utility's required return on common equity investments and bond yield.⁶²

In his direct testimony, Gorman used a 22-year average of authorized electric return and Treasury bond yields to calculate an indicated risk premium of 5.08 percent.⁶³ Gorman's decision to begin his historical analysis with 1986 data is purely arbitrary and he offers no compelling reason for doing so. A careful review of this data demonstrates his range and average risk premium are remarkably lower due to events that occurred 15-20 years ago.

The Commission finds that the use of more recent data when calculating a company's historical equity risk premium is helpful. The Commission makes no finding as to where that cut-off line should be, but finds the following analysis is worth noting in the context of Mr. Gorman's testimony. Using Gorman's data to calculate the average risk premium for the last ten years yields an average risk premium of 5.56 percent. Excluding 1999 data from that average yields a 5.68 percent risk premium. The averages for the most recent five-year period and three-year periods are 5.66 percent and 5.58 percent, respectively.

Further, in making these calculations, Gorman does not account for the fact that, in recent years, vertically-integrated electric utilities like AmerenUE have been awarded an average ROE substantially higher than the average for all electric utilities.

Therefore, the Commission finds the upper range of Gorman's risk premium estimates to be his most valid. If the five-year average indicated risk premium of 5.66 percent is added to the 5.1 percent 30-year Treasury bond yield used by Gorman in his Risk Premium analysis, the result is a return on equity of 10.76 percent.

As previously indicated, there is no precisely "correct" return on equity for AmerenUE. The Commission's manipulation of Gorman's recommendation is not intended to calculate a "correct" return. Rather it is intended to demonstrate the area in which a reasonable return is to be found. After a close examination, the recommendations of two of the other

⁶² Gorman Direct, Ex. 600, Page 28, Lines 12-13.

⁶³ Gorman Direct, Ex. 600, Schedule MPG-14.

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financial experts are also in the same range as the modified recommendation from Gorman.

Dr. Morin recommends a return on equity of 10.9 percent, which is slightly above the 10.76 percent return the Commission has found to be reasonable. However, Dr. Morin's recommendation includes an upward adjustment of approximately 30 basis points to allow for flotation costs.⁶⁴ Flotation costs are associated with stock issues. Those costs can either be expensed and recovered at the time the stock is issued, or they can be recovered over a longer period through the use of a flotation allowance, such as Morin incorporated in his return on equity recommendations.⁶⁵ However, Morin conceded that AmerenUE did not incur any flotation costs during the test year.⁶⁶ He also was unaware of whether this Commission has expensed flotation costs in the past, but concedes that if flotation costs were expensed they should not be recovered again through a flotation adjustment.⁶⁷

AmerenUE contends flotation costs could not have been expensed in many years because before it filed its last previous rate case in 2006, it had not filed a rate case in 20 years.⁶⁸ However, the absence of a rate case does not mean AmerenUE did not recover its costs during that period, nor does it mean it should be able to reach back to retroactively recover those costs in this case. Presumably, since AmerenUE chose not to file a rate case during that 20-year period, it was recovering at least a reasonable return on equity during that time.

Since the record does not clearly indicate whether AmerenUE's flotation costs have been expensed in the past, Morin's 30 basis point flotation adjustment must be removed from his return on equity recommendation. That reduces his return on equity recommendation to 10.6 percent, which is slightly lower than the 10.76 percent return the Commission has found to be reasonable. However, Morin also used the annual DCF model rather than the quarterly DCF model that the Commission found to be appropriate when discussing Gorman's recommendation. The Commission made only a 5 basis point adjustment to Gorman's recommendation, but Morin insisted a 20 basis point adjustment is appropriate.⁶⁹ A 20 basis point upward adjustment brings

⁶⁴ Morin Direct, Ex. 3, Page 63, Lines 11-16.

⁶⁵ Transcript, Page 393, Lines 4-19.

⁶⁶ Transcript, Page 393, Lines 4-6.

⁶⁷ Transcript, Page 402, Lines 1-5.

⁶⁸ Transcript, Page 462, Lines 3-8.

⁶⁹ Transcript, Page 435, Lines 2-6.

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Morin's recommendation back to 10.8 percent, which is very close to the 10.76 percent the Commission has found to be reasonable.

MEG's witness, Billie Sue LaConte, utilized three methods to analyze an appropriate return on equity for AmerenUE and found that a return on equity in the range of 10.1 percent to 10.6 percent would be appropriate.⁷⁰ At the hearing, LaConte agreed that anything within her range would be a reasonable return on equity.⁷¹ Thus, the top end of LaConte's recommendation is within 16 basis points of the rate the Commission has found to be reasonable.

Ms. LaConte frequently testifies before this Commission on rate design issues,⁷² and some of her points are well taken. However, a comparison of Ms. LaConte's return on equity analysis to that offered by Dr. Morin and Mike Gorman reveals that she did not provide quite the same detailed analysis as either of those two witnesses. This limits her credibility on the issue and the Commission does not find her testimony persuasive enough to require a reduction in the rate of return the Commission has found to be reasonable.

The final return on equity expert witness is Stephen Hill for the Commission's Staff. Hill recommended a return on equity of 9.5 percent, which is 70 basis points lower than any other recommendation offered in this case, and more than 100 basis points lower than the average allowed return on equity for all electric utilities throughout the country. Hill's recommendation would give AmerenUE the lowest return on equity authorized for any integrated electric utility in the country for 2008.⁷³ Mr. Hill does not argue that AmerenUE is, in fact, the least risky of all those utilities.

Hill generally testifies on behalf of consumer advocates,⁷⁴ but even Public Counsel in this case did not support his extremely low recommendation. Dr. Morin's rebuttal, surrebuttal, and live testimony convincingly explain all the problems with Hill's recommendation, and the Commission will not waste its time recounting those deficiencies. It is enough to say that based on Morin's testimony, the Commission specifically finds that Hill's return on equity recommendation in this case is not credible, and the Commission will give it no further consideration.

⁷⁰ LaConte Direct, Ex. 650, Page 14, Lines 2-4.

⁷¹ Transcript, Page 295, Lines 22-24.

⁷² Transcript, Page 285, Lines 10-13.

⁷³ Ex. 60.

⁷⁴ Transcript, Page 490, Lines 7-14.

Should the Commission adjust AmerenUE's return on equity downward in the event a fuel adjustment clause is awarded?

In this Report and Order, the Commission is authorizing AmerenUE to implement a fuel adjustment clause for the first time. Several parties contend the allowed return on equity should be adjusted downward to recognize the decreased risk AmerenUE will face because it now has a fuel adjustment clause.

There is no dispute that the implementation of a fuel adjustment clause will reduce the level of operating risk AmerenUE will face. The question is whether the analysts' recommendations already take that decreased risk into account.

Fuel adjustment clauses are commonly used around the country,⁷⁵ so most of the comparable companies included in the proxy groups used by the various return on equity analysts already have fuel adjustment clauses in place. Moreover, the overwhelming majority of the jurisdictions where traditional vertically-integrated utilities like AmerenUE operate (including our neighboring states of Arkansas, Kansas and Oklahoma) allow for the 100 percent pass-through of fuel and purchased power costs, which are the most significant costs AmerenUE faces. This Report and Order will not allow AmerenUE to pass-through 100 percent of those costs, meaning AmerenUE will retain more risk than most comparable companies.

AmerenUE's witness, Dr. Morin, testified that if AmerenUE did not receive a fuel adjustment clause he would have to increase his return on equity recommendation by 25 basis points to compensate AmerenUE for the higher financing costs and increased risk it would face.⁷⁶ That possible upward adjustment does not, however, mean a similar downward adjustment must be made for the presence of a fuel adjustment clause.

As indicated, most of the companies included in the proxy groups used by the analysts to estimate an appropriate return on equity for AmerenUE already operate under a fuel adjustment clause. That means the analysts are measuring and evaluating AmerenUE against companies with a level of risk that takes into account their use of a fuel adjustment clause. Therefore, while an upward adjustment may have been appropriate if a fuel adjustment clause were not allowed, no

⁷⁵ Lyons Rebuttal, Ex. 42, Schedule MJL-RE8.

⁷⁶ Morin Direct, Ex. 3, Page 68, Lines 6-14.

corresponding reduction is necessary because a fuel adjustment clause will be in place.

Generic Return on Equity Case

Billie Sue LaConte, the witness for MEG, advised the Commission to consider opening a generic return on equity case to better deal with future rate cases. Such a case would have no effect on AmerenUE's current rate case, but it might make the Commission's task easier in future rate cases. At the same time, it would also bring some certainty to utilities and other parties as they participate in those future rate cases. The concept of a generic case was supported at the hearing by other witnesses and parties.

The Commission is interested in learning more about the concept of a generic return on equity case and plans to hold a roundtable or open a working case to consider that concept. Moreover, this Commission finds that discussion of a generic return on equity should included the quarterly DCF issue previously discussed in this Report and Order.

Conclusions of Law:

In assessing the Commission's ability to use different methodologies to determine just and reasonable rates, the Missouri Court of Appeals has said:

Because ratemaking is not an exact science, the utilization of different formulas is sometimes necessary. ... The Supreme Court of Arkansas, in dealing with this issue, stated that there is no 'judicial mandate requiring the Commission to take the same approach to every rate application or even to consecutive applications by the same utility, when the commission in its expertise, determines that its previous methods are unsound or inappropriate to the particular application' (quoting *Southwestern Bell Telephone Company v. Arkansas Public Service Commission*, 593 S.W. 2d 434 (Ark 1980)).⁷⁷

Furthermore,

⁷⁷ *State ex rel. Assoc. Natural Gas Co. v. Public Service Commission*, 706 S.W. 2d 870, 880 (Mo. App. W.D. 1985).

Not only can the Commission select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances, but it also may adopt or reject any or all of any witnesses' testimony.⁷⁸

In another case, the Court of Appeals recognized that the establishment of an appropriate rate of return is not a "precise science":

While rate of return is the result of a straight forward mathematic calculation, the inputs, particularly regarding the cost of common equity, are not a matter of 'precise science,' because inferences must be made about the cost of equity, which involves an estimation of investor expectations. In other words, some amount of speculation is inherent in any ratemaking decision to the extent that it is based on capital structure, because such decisions are forward-looking and rely, in part, on the accuracy of financial and market forecasts.⁷⁹

Section 386.266, RSMo (Supp. 2008), the statute that allows the Commission to order AmerenUE to implement a fuel adjustment clause, allows the Commission to modify a company's allowed return on equity to reflect the implementation of a fuel adjustment clause. Specifically, subsection 7 of that statute provides that the Commission may:

take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

That section does not, however, require the Commission to make any adjustment to allowed return on equity when it allows a company to implement a fuel adjustment clause.

Decision:

Based on the evidence in the record, on its analysis of the expert testimony offered by the parties, and on its balancing of the interest of the

⁷⁸ *Id.*

⁷⁹ *State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 376, 383 (Mo App. W.D. 2005).

company's ratepayers and shareholders, as fully explained in its findings of fact and conclusions of law, the Commission finds that 10.76 percent is a fair and reasonable return on equity for AmerenUE. The Commission finds that this rate of return will allow AmerenUE to compete in the capital market for the funds needed to maintain its financial health. As one final check on reasonableness, the 10.76% return on equity is within 15 basis points of the national average return on equity for electric utility companies.

2. Vegetation Management and Infrastructure Inspection Expenses

Introduction:

In 2006, AmerenUE experienced extensive service outages due to severe thunderstorms in the summer and ice storms in the winter. In response to concerns that AmerenUE and other electric utilities had failed to properly maintain their electric distribution systems, the Commission promulgated new rules designed to compel Missouri's electric utilities to do a better job of maintaining their electric distribution facilities to enhance the reliability of electric service to customers. Those rules, entitled Electrical Corporation Infrastructure Standards⁸⁰ and Electrical Corporation Vegetation Management Standards and Reporting Requirements,⁸¹ became effective on June 30, 2008.

The rules establish specific standards requiring electric utilities, including AmerenUE, to inspect and replace old and damaged infrastructure, such as poles and transformers. In addition, electric utilities are required to more aggressively trim tree branches and other vegetation that encroaches on transmission lines. In promulgating the stricter standards, the Commission anticipated utilities would have to spend more money to comply. Therefore, both rules include provisions that allow the utility a means to recover to the extra costs it incurs to comply with the requirements of the rule. In general, this issue concerns whether and how AmerenUE will be allowed to recover those costs.

This is a complicated and confusing issue that the Commission will address in pieces by answering the specific questions offered by the parties in the Statement of Issues filed before the start of the hearing. Once the specific pieces are addressed, the overall picture will come into focus.

⁸⁰ Commission Rule 4 CSR 240-23.020.

⁸¹ Commission Rule 4 CSR 240-23.030.

a. Vegetation Management**What level of vegetation management expense is appropriate for recognition in AmerenUE's revenue requirement in this case?****Findings of Fact:**

The determination of this number is the starting point for other decisions to follow. Staff proposes the amount be set at the company's actual expenditures during the test year, trued-up through September 30, 2008.⁸² What that amount may be is not clearly revealed in the record. Initially, Staff indicated the test year level of vegetation management costs should be set at \$45,666,000,⁸³ which is a number derived from the supplemental direct testimony of AmerenUE's witness, Gary Weiss.⁸⁴ However, since Weiss' testimony was filed on June 16, 2008, that number would not be trued-up through September 30, 2008. At the hearing, Staff's witness indicated his belief that the trued-up number might have been \$49.7 million.⁸⁵

AmerenUE proposes the base amount for vegetation management be set at the average amounts included in AmerenUE's budgets for 2009 and 2010.⁸⁶ In Ron Zdellar's rebuttal testimony, he says that number is \$49 million.⁸⁷ However, in his corrected surrebuttal testimony, the number has become \$54.1 million.⁸⁸

Whatever the exact numbers, the important determination at this point is the principle of whether an actual test year amount or a prospective budgeted amount should be used. Public Counsel, and presumably Staff, oppose the use of budgeted cost numbers, because they believe such numbers are not known and measurable.⁸⁹ AmerenUE's expenditures on vegetation management have increased each quarter of 2008, as the company ramps up its compliance with the Commission's vegetation management rules.⁹⁰ Therefore, a projected

⁸² Transcript, Page 1673, Lines 6-12.

⁸³ Beck Surrebuttal, Ex. 218, Page 4, Lines 8-9.

⁸⁴ Weiss Supplemental Direct, Ex. 11, Page 20, Lines 8-9.

⁸⁵ Transcript, Page 1673, Lines 13-19. That number is also found in Zdellar's workpapers entered into evidence as Ex. 240.

⁸⁶ Transcript, Page 1610, Lines 20-24.

⁸⁷ Zdellar Rebuttal, Ex. 16, Page 9, Lines 1-2.

⁸⁸ Ex. 76.

⁸⁹ Robertson Surrebuttal, Ex. 408, Page 4, Lines 10-11.

⁹⁰ Zdellar Surrebuttal, Ex. 17, Page 3, Lines 21-22.

budget amount is more likely to properly measure the company's actual expenditures in the coming years.

AmerenUE has made good progress in meeting its prior commitments and the requirements of the Commission's rule by attaining the required four and six-year tree trimming cycles as of November 14, 2008.⁹¹ The Commission wants to encourage the company to continue making progress and allowing an amount in rates that is likely to match the company's actual expenditures is the best way to achieve that goal. Therefore, the Commission will include \$54.1 million as the base amount of vegetation management costs for the calculation of rates in this case.

Should AmerenUE's revenue requirement in this case include a three year amortization of vegetation management expense from January 1, 2008 to June 30, 2008 that is in excess of the \$45 million annual level that was included in AmerenUE's revenue requirement for Case No. ER-2007-0002?

Should AmerenUE's revenue requirement in this case include a three year amortization of vegetation management expense from July 1, 2008 to September 30, 2008 that is in excess of the \$45 million annual level that was included in AmerenUE's revenue requirement for Case No. ER-2007-0002?

These two questions are interrelated so the Commission will address them together.

Findings of Fact:

In answering the previous question, the Commission determined AmerenUE's rates going forward should allow the company to recover \$54.1 million per year from ratepayers for vegetation management expenses. In AmerenUE's last rate case, the Commission approved a stipulation and agreement that allowed the company to recover \$45 million per year, and, in fact, established a one-way tracker that required the company to spend that amount of money on vegetation management, but did not track or require future consideration of any additional spending over \$45 million.⁹²

⁹¹ Transcript, Page 1608, Lines 17-20.

⁹² Transcript, Pages 1626-1627, Lines 18-25, 1-15.

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The Commission's new vegetation management rule includes a provision that allows an electric utility to recover expenses it incurs to comply with the rule to the extent those costs exceed the amount allowed in the utility's existing rates.⁹³ Between January 1, 2008, and September 30, 2008, AmerenUE spent an additional \$2.9 million for vegetation management, beyond what it was able to recover in its existing rates.⁹⁴ AmerenUE asks that it be allowed to amortize that amount over three years and recover it in the rates to be established in this case.

Staff opposes AmerenUE's attempt to recover these additional expenditures for two reasons: first, because the one-way tracker from the last rate case does not allow AmerenUE to track and recover expenditures above \$45 million; and second, because AmerenUE's additional expenditures are related to its prior commitment to improve its vegetation management practices, and not because of the implementation of the new vegetation management rule.⁹⁵

Staff does not identify, and the Commission does not find, anything in the one-way tracker implemented in AmerenUE's last rate case that would preclude the company from utilizing the clear provisions of the rule to recover the additional expenses it incurred to comply with the vegetation management rule. Thus, to the extent AmerenUE incurred additional costs to comply with the rule, it should be allowed to recover those costs in this case.

The question of whether AmerenUE's additional expenditures were caused by its compliance with the new rule is complicated by the fact that the new rule did not go into effect until June 30, 2008. Thus, AmerenUE's increased expenditures for the period of January 1, 2008 to June 30, 2008, undeniably occurred before the rule went into effect.

However, AmerenUE began complying with the Commission's rule on January 1, 2008, six months before the rule went into effect.⁹⁶ It did so because it anticipated that the rule would be effective on January 1, and in fact, the rule would have been effective on that date except the Commission missed the deadline for submission of its rulemaking to the secretary of state and had to restart the rulemaking process. Staff's witness, however, agreed that AmerenUE's decision to begin complying

⁹³ Commission Rule 4 CSR 240-23.020(4).

⁹⁴ Exhibit 76, Page 12, Lines 5-6.

⁹⁵ Beck Rebuttal, Ex. 217, Page 7, Lines 1-9.

⁹⁶ Zdellar Surrebuttal, Ex. 17, Page 2, Lines 6-8.

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with the rule before it became effective was a good practice that benefited the company's ratepayers.⁹⁷

The Commission finds that AmerenUE's decision to begin complying with requirements of the rule benefited the reliability of AmerenUE's electric system and thus benefited the company's ratepayers. The fact that those costs were incurred before the rule went into effect does not affect AmerenUE's ability to recover those costs under the terms of the rule.

However, that determination does not necessarily mean that AmerenUE incurred those costs because of the rule. As Staff points out, in a previous case,⁹⁸ AmerenUE made a commitment to increase its spending on vegetation management to improve the reliability of its electric system. In particular, AmerenUE agreed to implement a four-year tree-trimming cycle in urban areas and a six-year cycle in rural areas by the end of 2008.⁹⁹ Staff contends AmerenUE's extra spending was to comply with that earlier commitment and not to comply with the rule.

"The rule requires AmerenUE to take steps above and beyond its earlier commitment. The rule also sets a minimum clearance distance, requires mid-cycle inspections, customer education efforts, and requires notice be given before trimming. None of those requirement existed before AmerenUE began complying with the new rules and all impose additional costs on the company.¹⁰⁰

Furthermore, the existence of the \$45 million one-way tracker in the previous rate case actually supports AmerenUE's position. The \$45 million was established in the last rate case as the amount AmerenUE would be required to spend to comply with the commitments it had made at that time. It is reasonable to assume it actually spent that amount to comply with those earlier commitments. However, after AmerenUE began complying with the rule on January 1, 2008, it spent more than the \$45 million it was required to spend under the tracker. Therefore, the Commission concludes the extra \$2.9 million spent above \$45 million was the amount AmerenUE spent to comply with the rule. Under the terms of the rule, AmerenUE is entitled to recover that amount from ratepayers, and it may do so by amortizing \$2.9 million over three years and recovering it in rates.

⁹⁷ Transcript, Page 1682, Lines 20-23.

⁹⁸ Commission Case No. EW-2004-0583.

⁹⁹ Zdellar Surrebuttal, Ex. 17, Page 4, Lines 8-18.

¹⁰⁰ Zdellar Surrebuttal, Ex. 17, Page 4, Lines 19-23.

Should accounting authority be granted for vegetation management expense incurred from October 1, 2008 to February 28, 2009, in excess of the \$45 million annual level that was included in AmerenUE's revenue requirement for Case No. ER-2007-0002, with this cost being deferred for treatment in AmerenUE's next rate case? Findings of Fact:

AmerenUE is requesting an accounting authority order to allow it to accumulate and defer the additional costs of complying with the vegetation management rule it will incur during the period of October 1, 2008 through February 28, 2009.¹⁰¹ That period is between the end of the true-up for this case and the beginning of new rates that will go into effect at the end of this case. The Commission has just found that extra expenses incurred before October 1 can be recovered in this case. Similarly, extra expenses incurred after February 28 would be deferred for future consideration in the tracking mechanism that will be considered later in this order. However, extra expenses AmerenUE incurs during this gap could not be considered and recovered in a future rate case unless an accounting authority order is authorized.

Staff opposed granting of the requested accounting authority for the same reason it opposed allowing AmerenUE to recover the extra expenses it incurred through September 30, 2008. For the same reasons it rejected Staff's arguments regarding those costs, the Commission rejects Staff's arguments regarding the requested accounting authority order. AmerenUE is authorized to accumulate and defer the additional costs of complying with the vegetation management rule it will incur during the period from October 1, 2008, through February 28, 2009.

Should a tracker be implemented for vegetation management expense that exceeds the level of vegetation management expense the Commission recognized in AmerenUE's revenue requirement in this case? Should such a tracker be implemented for the one-year period of March 1, 2009 to February 28, 2010?

Findings of Fact:

AmerenUE asks the Commission to implement a two-way tracking mechanism for vegetation management and infrastructure inspection and repair expenses. The tracker would set a base level of vegetation management and infrastructure inspection and repair costs. Actual expenditures would then be tracked around that base level with the

¹⁰¹ Zdellar Surrebuttal, Ex. 17, Page 12, Lines 8-10.

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creation of a regulatory liability in any year where AmerenUE spends less than the target amount, and a regulatory asset where the company spends more than the target amount. The assets and liabilities would then be netted against each other and considered in AmerenUE's next rate case.¹⁰²

Staff supports the idea of a two-way tracking mechanism. However, Staff would place a ten percent cap on expenditures,¹⁰³ and would limit the operation of the tracker to only one year, March 1, 2009, through February 28, 2010.¹⁰⁴

The Commission finds a ten percent cap on the tracker to be appropriate. Without a cap, the tracker would essentially give AmerenUE a blank check to spend however much it wants on vegetation management with assurance that any expenditure will likely be recovered from ratepayers. Of course, any such expenditure would still be subject to a prudence review in the next rate case, but a prudence review is not a complete substitute for a good financial incentive. If AmerenUE finds it must increase its vegetation management spending to a level more than ten percent above its budgeted amount, it has the option of coming to the Commission for accounting authority to defer those costs for consideration in a future rate case.¹⁰⁵

Public Counsel opposes the implementation of any tracking mechanism. Public Counsel's witness argues "the use of tracker mechanisms subvert the regulatory rate model process and should be used in very limited instances."¹⁰⁶ Public Counsel further explains that tracker mechanisms violate the "matching principle" of regulation by moving revenues or expenses away from the time in which they were incurred, to be recovered from future ratepayers who may not have benefited from the expenditures.¹⁰⁷ They also reduce the utility's business risk at the expense of ratepayers, and they reduce the utility's incentive to minimize its expenses.¹⁰⁸

Staff also suggests the tracker be limited to one year. Staff provided no testimony or other evidence to support such a restriction. The

¹⁰² Zdellar Rebuttal, Ex. 16, Pages 7-8, Lines 15-22, 1-2.

¹⁰³ Transcript, Page 1684, Lines 7-22.

¹⁰⁴ Beck Surrebuttal, Ex. 218, Page 6, Lines 22-23.

¹⁰⁵ Transcript, Page 1703, Lines 14-25.

¹⁰⁶ Robertson Surrebuttal, Ex. 408, Page 10, Lines 4-5.

¹⁰⁷ Robertson Surrebuttal, Ex. 408, Pages 10-11, Lines 17-21, 1.

¹⁰⁸ Robertson Surrebuttal, Ex. 408, Page 11, Lines 1-21.

Commission finds that the tracker shall remain in effect until new rates are established in the next rate case.

Public Counsel's general concerns about the overuse of tracking mechanisms are valid. The Commission does not intend to allow the overuse of tracking mechanisms in this case, or in future rate cases. However, the tracker proposed by AmerenUE in this case is appropriate. This is a limited tracker that will have only a limited effect on AmerenUE's business risk. With the cap proposed by Staff, the tracker can increase AmerenUE's vegetation management costs by no more than approximately five million dollars. Furthermore, because the vegetation management rule is still very new, no one can know with any certainty how much AmerenUE will need to spend to comply with the rule's provisions. The tracker will ensure AmerenUE does not over-recover for its actual expenditures, as much as it will ensure it does not under-recover those expenditures. Thus, the risk for ratepayers, as well as for AmerenUE, is reduced by operation of the tracking mechanism.

In addition, Public Counsel is concerned AmerenUE will have fewer electrical outages on its system in the future because of the work that it is doing to comply with the vegetation management rule.¹⁰⁹ As a result, AmerenUE will likely have fewer outage related expenses. Public Counsel points out that any reduction in outage related expenses will not be included in the tracker.¹¹⁰

Public Counsel's concerns are unwarranted. The Commission certainly hopes AmerenUE's increased spending on vegetation management will result in a reduction in outage related expenses. That will mean AmerenUE's electric system has become more reliable, a result that will certainly benefit the utility's customers. Any reduction in outage related expenses will, of course, be reflected in a reduced cost of service in AmerenUE's next rate case. In the same rate case, the Commission will consider any adjustments, up or down, that result from application of the tracking mechanism the Commission will approve in this case. Thus, balance will be maintained and ratepayers will not be harmed by operation of the tracking mechanism.

b. Infrastructure Inspection and Repair.

What level of infrastructure inspection and repair expense is appropriate for recognition in AmerenUE's revenue requirement in this case?

¹⁰⁹ Transcript, Page 1622, Lines 19-22.

¹¹⁰ Transcript, Page 1618, Lines 3-8.

Findings of Fact:

AmerenUE proposes it be allowed to recover \$23.9 million in this case for infrastructure inspection and repair costs.¹¹¹ Staff would limit AmerenUE's recovery under these provisions to the amount spent for inspections, but would eliminate expenditures for repairs made as a result of those inspections.¹¹² The Commission finds that AmerenUE's rates already allow for recovery of the expenditures required to repair its electric system. The fact those repairs may occur following an inspection does not mean the repairs would not eventually have been made anyway and there is no reason to believe the repairs would be more costly simply because they were made after an inspection. Thus, to allow recovery under this provision as an increased cost of complying with the rule could result in a double recovery of those costs.¹¹³

AmerenUE's witness, Ron Zdellar, offered vague assurances AmerenUE would be able to separate repair costs resulting from inspections from repair costs resulting from a system failure or a customer report of problems,¹¹⁴ thus avoiding the double counting problem. However, the Commission is not convinced, and finds that the risk of double recovery precludes AmerenUE's attempt to recover repair costs under this provision. Therefore, the Commission finds that AmerenUE shall recover \$10.7 million as the cost of conducting infrastructure inspections. That amount is the average of AmerenUE's forecast expense for 2009 and 2010.¹¹⁵

Should AmerenUE's revenue requirement in this case include a three year amortization of infrastructure inspection and repair expense from January 1, 2008 to June 30, 2008?

Should AmerenUE's revenue requirement in this case include a three year amortization of infrastructure inspection and repair expense from July 1, 2008 to September 30, 2008?

Should accounting authority be granted for infrastructure inspection and repair expenses incurred from October 1, 2008 to February 28, 2009, with these costs being deferred for treatment in AmerenUE's next rate case?

¹¹¹ Zdellar Surrebuttal, Ex. 17, Page 12, Lines 14-15.

¹¹² Beck Surrebuttal, Ex. 218, Page 11, Lines 23-24.

¹¹³ Beck Surrebuttal, Ex. 218, Page 11, Lines 24-28.

¹¹⁴ Zdellar Surrebuttal, Ex. 17, Pages 10-11, Lines 17-21, 1-2.

¹¹⁵ Exhibit 240.

Findings of Fact:

AmerenUE again proposes a three-year amortization and recovery in rates of the \$8.0 million in infrastructure inspection and repair expenses it incurred to comply with the Commission's rule from January 1, 2008, through September 30, 2008.¹¹⁶ For the compliance costs incurred from October 1, 2008, through February 28, 2009, AmerenUE requests an accounting authority order to defer those costs for consideration in its next rate case.

Staff again opposes recovery of the amount incurred before the rule went into effect on June 30, 2008. For the reasons previously described regarding the vegetation management rule, the Commission rejects that position.

Conclusions of Law:

For the costs AmerenUE incurred from July 1, 2008 through September 30, 2008, Staff again opposes AmerenUE's proposal to amortize and recover those costs in this case. Staff instead advises the Commission to grant AmerenUE accounting authority to defer recognition of the costs incurred from July 1, 2008 through February 28, 2009 for consideration in AmerenUE's next rate.¹¹⁷ In its brief, Staff suggests those costs simply be added to the tracking mechanism for consideration in AmerenUE's next rate case.

Staff takes that position because of its interpretation of a provision of the Commission's Infrastructure Standards Rule, 4 CSR 240-23.020.¹¹⁸ Section (4) of that rule allows a utility to request an accounting authority order to recover compliance costs in its next general rate case, "filed after the effective date of this rule". AmerenUE filed this before the rule became effective, so Staff contends the costs incurred from July 1, 2008, through September 30, 2008 cannot be recovered in this case and must instead be deferred until AmerenUE's next rate case.

Staff's interpretation of the rule is overly technical and nonsensical. The intent of the rule is simply to indicate costs may be deferred until the next rate case. The Commission did not intend to limit a utility's ability to recover costs incurred within the update period of a pending rate case. AmerenUE may amortize its infrastructure inspection costs incurred from January 1, 2008, through September 30, 2008, to comply with the

¹¹⁶ Exhibit 76.

¹¹⁷ Beck Surrebuttal, Ex. 218, Page 11, Lines 1-3.

¹¹⁸ Beck Surrebuttal, Ex. 218, Page 11, Lines 5-19.

Commission's Infrastructure Standards rule over three years and recover those costs in this case. Furthermore, AmerenUE is granted accounting authority to defer its infrastructure inspection costs incurred between October 1, 2008, and February 28, 2009, to comply with the Commission's Infrastructure Standards rule.

AmerenUE also proposed to recover or defer its cost of infrastructure repairs. For the reasons previously stated, the Commission finds that recovery or deferral of those repair costs is not appropriate.

In his surrebuttal testimony for AmerenUE, Ron Zdellar indicated the cost of infrastructure inspection and repairs for the period of January 1, 2008, through September 30, 2008, was \$8.6 million. Exhibit 240, drawn from Zdellar's work papers, breaks that down into \$3.7 million for inspections and \$4.9 million for repairs for the January through September period. In his corrected surrebuttal testimony, which is exhibit 76, Zdellar reduces that amount to a total of \$8.0 million for infrastructure inspection and repair. Unfortunately, the record does not contain a breakdown of that total amount between repairs and inspections. Since the Commission has determined AmerenUE should not be allowed to defer and recover those repair costs, the Commission must devise a way to remove those costs from the total.

The Commission will assume Zdellar's corrected amount will retain the same ratio of repair costs to inspection costs as that in the number contained in his surrebuttal testimony. The number in the surrebuttal testimony was 43 percent inspection costs and 57 percent repair cost. Applying the same ratio to the \$8.0 million number in exhibit 76 shows inspection costs of \$3.44 million and repair costs of \$4.56 million. Thus, the Commission will allow AmerenUE to amortize \$3.44 million in inspection costs over 3 years and recover them in the rates to be established in this case.

Should a tracker be implemented for infrastructure inspection and repair expense that exceeds the level of infrastructure inspection and repair expense the Commission recognizes in AmerenUE's revenue requirement in this case? Should such a tracker be implemented for the one-year period of March 1, 2009 to February 28, 2010?

Findings of Fact:

AmerenUE proposes a single tracking mechanism that would track both vegetation management expenses and infrastructure

inspection expenses. The Commission has previously approved a tracker for vegetation management expenses and for the same reasons, will approve the tracking mechanism to also apply to infrastructure inspection expenses as previously described.

Conclusions of Law Regarding Vegetation Management and Infrastructure Inspection and Repair:

Commission Rule 4 CSR 240-23.020 establishes standards requiring electrical corporations, including AmerenUE, to inspect its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.020(3)(A) establishes a four-year cycle for inspection of urban infrastructure and a six- year cycle for inspection of rural infrastructure.

Commission Rule 4 CSR 240-23.020(4) establishes a procedure by which an electric utility may recover expenses it incurs because of the rule. Specifically, that section states as follows:

In the event an electrical corporation incurs expenses as a result of this rule in excess of the costs included in current rates, the corporation may submit a request to the commission for accounting authorization to defer recognition and possible recovery of these excess expenses until the effective date of rates resulting from its next general rate case, filed after the effective date of this rule, using a tracking mechanism to record the difference between the actually incurred expenses as a result of this rule and the amount included in the corporation's rates

Commission Rule 4 CSR 240-23.030 establishes standards requiring electrical corporations, including AmerenUE, to trim trees and otherwise manage the growth of vegetation around its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.030(9) establishes a four-year cycle for vegetation management of urban infrastructure and a six-year cycle for vegetation management of rural infrastructure. The vegetation management rule also includes a provision that would allow AmerenUE to ask the Commission for authority to accumulate and recover its cost of compliance in its next rate case.¹¹⁹

¹¹⁹ Commission Rule 4 CSR 240-23.030(10).

Decision:

The Commission's decision regarding vegetation management and infrastructure inspection expenses can be summarized as follows:

1. AmerenUE shall recover in its base rates \$54.1 million for vegetation management costs, and \$10.7 million for infrastructure inspection costs.

2. AmerenUE shall amortize over three years and recover in rates \$2.9 million for vegetation management expenses beyond what it was able to recover in prior rates. AmerenUE shall amortize over three years and recover in rates \$3.44 million in infrastructure inspection costs beyond what it was able to recover in prior rates.

3. AmerenUE shall establish a tracking mechanism to track future vegetation management and infrastructure inspection costs. That tracking mechanism shall include a base level of \$64.8 million (\$54.1 million + \$10.7 million = \$64.8 million). Actual expenditures shall be tracked around that base level with the creation of a regulatory liability in any year where AmerenUE spends less than the base amount and a regulatory asset in any year where AmerenUE spends more than the base amount. The assets and liabilities shall be netted against each other and shall be considered in AmerenUE's next rate case. The tracking mechanism shall contain a ten percent cap so expenditures exceeding the base level by more than 10 percent shall not be deferred under the tracking mechanism. If AmerenUE's vegetation management and infrastructure inspection costs exceed the ten percent cap, it may request additional accounting authority from the Commission in a separate proceeding. The tracking mechanism shall operate until new rates are established in AmerenUE's next rate case.

3. January 2007 Ice Storm AAO

Introduction:

AmerenUE experienced a severe ice storm in its service territory on January 13, 2007. Staff and AmerenUE agree AmerenUE incurred \$24.56 million in storm restoration costs following that storm.¹²⁰ In an earlier case, Case No. EU-2008-0141, the Commission approved a stipulation and agreement that gave AmerenUE an accounting authority order (AAO) authorizing it to defer those storm restoration costs for

¹²⁰ Cassidy Surrebuttal, Ex. 226, Page 11, Lines 7-9.

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consideration in this rate case.¹²¹ The approved stipulation and agreement also determined the storm restoration costs would be amortized over a five-year period. In other words, an amount would be included in rates that would allow AmerenUE to recover one fifth of the total costs in each of five years. The only disagreement was about when that amortization period should begin. Rather than resolve that question, the stipulation and agreement in the AAO case provided the issue would be deferred for consideration in this rate case, which was already pending at the time.

Staff proposes the five-year amortization period begin on February 1, 2007, approximately two weeks after the storm.¹²² AmerenUE contends the five-year amortization period should begin on March 1, 2009, the presumed effective date of the new rates that will be established in this case.¹²³

Findings of Fact:

Staff's proposed February 1, 2007, starting date for the amortization period effectively ensures AmerenUE will be unable to recover two fifths of the storm restoration costs for which the Commission granted an AAO. When the rates established in this case go into effect, more than two of the five years of amortization would have already occurred. Those amounts amortized over the first two years would be lost to AmerenUE and likely could not be recovered. In the particular circumstances of this case, that result would be unfair to AmerenUE.

The purpose of an AAO is to give the utility an opportunity to recover extraordinary expenses. In granting AmerenUE an AAO, based on the stipulation and agreement of the parties, the Commission determined the ice storm restoration costs are extraordinary costs, and no party disputes that fact. As Staff points out, an AAO is not intended to absolutely ensure a utility recovers all those extraordinary expenses.¹²⁴ However, the utility should be given a reasonable opportunity to make that recovery.

¹²¹ *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE for an Accounting Authority Order Regarding Accounting for the Extraordinary Costs Relating to Damage from the January 2007 Ice Storm*, Case No. EU-2008-0141, Order Approving Stipulation and Agreement, April 30, 2008.

¹²² Cassidy Surrebuttal, Ex. 226, Page 11, Lines 12-13.

¹²³ Barnes Rebuttal, Ex. 26, Page 8, Lines 3-5.

¹²⁴ Cassidy Surrebuttal, Ex. 226, Page 13, Lines 2-4.

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Staff's proposed date for beginning the amortization period would not give AmerenUE a reasonable opportunity to recover those expenses because of the timing of this ice storm in relation to AmerenUE's last rate case. The ice storm occurred on January 13, 2007. That was only two weeks after the January 1, 2007, cut-off date for known and measurable changes in AmerenUE's last rate case.¹²⁵ Therefore, AmerenUE incurred the expenses after the close of the test year and as a result could not recover those costs in the normal course of that rate case.

Staff suggests perhaps AmerenUE could have sought recovery of these expenses as an isolated adjustment in the last rate case.¹²⁶ However, such recovery would have been unlikely because the actual amount of the storm expenses was not known and measurable until the final invoices from contractors and other utilities were received in June 2007, after the rates from the prior rate case had gone into effect, and long after the evidentiary record in that case had closed. As a result, AmerenUE was effectively precluded from seeking recovery of those storm expenses in the last rate case.

That is important because in ordinary situations, when a utility obtains an AAO, it can control the timing of a rate case in which it will seek to recover the expenses deferred under the AAO. Thus, the utility can weigh the expenses that are being amortized under the AAO against its other expenses and revenues and decide whether it needs to come in for a rate case to try to recover the expenses that are being amortized. In some cases, the utility may conclude it does not need to increase its revenues and will decide not to file a rate case, allowing the costs deferred under the AAO to be amortized out of existence.

In this case, the extraordinary ice storm restoration expenses were incurred while AmerenUE was already in the later stages of a rate case, but too late to be recovered in that rate case. AmerenUE concluded it needed additional revenue as it failed to earn its allowed return on equity throughout 2007,¹²⁷ but as a practical matter, could not have filed a rate case much before April 2008 when it filed this case.¹²⁸ That means AmerenUE could not effectively use the option of filing a rate case to recover the costs sooner, as is frequently done in an AAO situation.

¹²⁵ Barnes Rebuttal, Ex. 26, Page 8, Lines 10-12.

¹²⁶ Transcript, Page 1858, Lines 7-10.

¹²⁷ Barnes Rebuttal, Ex. 26, Page 9, Chart at Line 1.

¹²⁸ Transcript, Page 1847-1848, Lines 3-25, 1.

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Staff contends AmerenUE would not necessarily be precluded from recovering the full amount of the expenses deferred under the AAO no matter when the five-year amortization begins. In theory, that is true, because once the annually amortized amount of expenses is included in rates, that amount of expenses will remain in rates until the Commission revises those rates in a future rate case. If the five-year amortization begins in 2007, as Staff proposes, the amortization would be complete in 2012. However, if AmerenUE chose not to file another rate case until 2014 the annually amortized amount of expenses would continue in rates for two extra years and AmerenUE would fully recover its storm restoration expenses. Indeed, if AmerenUE did not bring a rate case until 2015 or later, it could actually over-recover those expenses.

However, given the rising cost environment facing AmerenUE, it is unreasonable to believe the company will wait until 2014, or after, to file its next rate case. Indeed, the testimony presented at the hearing indicated AmerenUE will not wait nearly that long to file its next rate case.¹²⁹ Furthermore, since the Commission is authorizing AmerenUE to establish a fuel adjustment clause in this case, AmerenUE will be required to file a new rate case no later than 2012, so that new rates will go into effect no later than March 1, 2013.¹³⁰ Under these circumstances, there is no risk that AmerenUE will over-recover its storm restoration expenses, and beginning the five-year amortization on the date proposed by Staff would guarantee AmerenUE would be unable to recover the full amount of expenses.

Conclusions of Law:

A fuel adjustment clause approved under Section 386.266, RSMo (Supp. 2008), the statute that give the Commission authority to approve a fuel adjustment clause for an electric utility, must contain a provision requiring the utility to “file a general rate case with the effective date of new rates to be no later than four years after the effective date of the commission order implementing the adjustment mechanism.”

Decision:

Under the unique circumstances of this case, the five-year amortization period for the storm restoration costs relating to the January 2007 ice storm shall begin on March 1, 2009. This decision is dictated by these particular facts and should not be interpreted as a general rule that

¹²⁹ Transcript, Page 2210, Lines 9-12, and Ex. 433HC, Page 17, AmerenUE's exact plan for filing future rate cases is highly confidential.

¹³⁰ Section 386.266, RSMo (Supp. 2008).

would require the beginning of an amortization period in a future case to coincide with the effective date of rates in a future rate case.

4. Deferred Income Taxes

Introduction:

Deferred income taxes arise from temporary differences between book and tax treatment of an item of income or expense. Under well-established regulatory principles, deferred taxes are treated as a reduction to rate base so ratepayers do not pay a return on funds provided to the company at no cost.¹³¹ In that way, ratepayers are given the benefit of what is, in effect, an interest free loan from the government to the utility.¹³² In other words, the benefit the company receives from being able to keep money by delaying payment to the government is passed along to ratepayers.

There is no disagreement about those principles. The issue concerns several uncertain tax positions AmerenUE has taken before the IRS. Staff wants to treat all of the money associated with those uncertain positions as deferred income taxes, and thus as a reduction to AmerenUE's rate base.¹³³ AmerenUE argues only the portion of the money it ultimately expects to pay to the IRS should be excluded from the deferred income tax category.¹³⁴

Findings of Fact:

AmerenUE has taken three tax positions with the IRS about which it is uncertain. In other words, it may ultimately have to pay additional tax if the IRS rules against AmerenUE's position. At this time those taxes have not been paid.¹³⁵ The IRS audit of AmerenUE's tax positions is still in progress and AmerenUE expects to learn the results of that audit in the summer of 2009.¹³⁶

Generally Accepted Accounting Principles (GAAP) provide rules for recording the effect of tax deferrals. Under a GAAP standard known as FIN 48, AmerenUE is required to record as deferred tax only the portion of

¹³¹ Staff Report – Cost of Service, Ex. 200, Page 11.

¹³² Nelson Rebuttal, Ex. 21, Page 4, Lines 10-16.

¹³³ Staff Report – Cost of Service, Ex. 200, Page 11.

¹³⁴ Nelson Rebuttal, Ex. 21, Page 4, Lines 17-21.

¹³⁵ Transcript, Pages 1076-1077, Lines 25, 1.

¹³⁶ Transcript, Page 1079, Lines 10-11.

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the tax liability upon which the company expects to prevail. The portion of that liability that the company ultimately expects to pay to the government in taxes, including interest, is treated as a "FIN 48 liability"¹³⁷

FIN 48 requires AmerenUE to review its FIN 48 liabilities quarterly and to adjust those liabilities to take into account changes in laws and regulations and the impact those changes may have on the company's prospects of prevailing before the IRS. The company's adjustments are reviewed quarterly by external auditors.¹³⁸ AmerenUE would exclude its FIN 48 liabilities from Staff's calculations of deferred taxes for ratemaking purposes. Staff would treat the entire amount of potential tax liability as if AmerenUE will win on all positions and never have to pay the tax.¹³⁹

If the ultimate outcome before the IRS matches the FIN 48 analysis, in other words, AmerenUE loses the uncertain tax positions, there would be no deferral of tax and no means by which AmerenUE would recover the amount that reduced rates, but was not actually realized by the company.¹⁴⁰

Both ratepayers and shareholders benefit when AmerenUE takes an uncertain tax position with the IRS, because saving money on taxes benefits the company's bottom line and reduces the amount of expense the ratepayers must pay. At the hearing, Staff's witness agreed AmerenUE should pursue such positions.¹⁴¹ The best way to encourage AmerenUE to continue to take uncertain tax positions is to treat the company fairly in the regulatory process.

AmerenUE should not be required to recognize as deferred taxes the amount of its uncertain tax positions it ultimately expects to pay with interest to the IRS. The best means of determining that amount is by recognizing the allocation of those costs AmerenUE already makes under FIN 48. Therefore, the Commission will exclude from the deferred taxes account the amount of AmerenUE's FIN 48 liability.

Conclusions of Law:

There are no additional conclusions of law for this issue.

¹³⁷ Nelson Rebuttal, Ex. 21, Page 5, Lines 9-19.

¹³⁸ Nelson Rebuttal, Ex. 21, Page 5, Lines 21-23.

¹³⁹ Staff Report - Cost of Service, Ex. 200, Page 12.

¹⁴⁰ Nelson Rebuttal, Ex. 21, Page 6, Lines 6-9.

¹⁴¹ Transcript, Pages 1086-1087, Lines 23-25, 1-2.

Decision:

The Commission finds in favor of AmerenUE's position. AmerenUE's FIN 48 liability shall be excluded from consideration in the deferred taxes account.

5. Entergy Arkansas Equalization Costs in SO2 or other Tracker

Introduction:

This issue concerns potential refunds AmerenUE may receive as the result of ongoing litigation before the Federal Energy Regulatory Commission (FERC). The disagreement was between Staff and AmerenUE. At the hearing, Staff and AmerenUE read the following stipulation into the record as a settlement of their disagreement:

The company shall maintain such books and records as are necessary to allow the Staff to identify the amount of refunds, if any, the company may receive in the future arising from the dispute involving the 1999 purchased power service agreement with Entergy Arkansas described in the surrebuttal testimony of Staff witness John P. Cassidy. The company shall also maintain the books and records necessary to identify any costs associated with obtaining any such refunds such as legal expenses associated with efforts to obtain refunds.¹⁴²

Decision:

The stipulation agreed to by the parties is a reasonable resolution of their disagreement. The Commission accepts that stipulation as a resolution of this issue.

6. Off-System Sales

This issue was resolved by the Stipulation and Agreement as to Off-System Sales Related Issues, which the Commission approved in an order issued on December 30, 2008.

7. The Proposed Fuel Adjustment Clause

General Findings of Fact Regarding Fuel Adjustment Clauses:

¹⁴² Transcript, Pages 1866-1867, Lines 24-25, 1-10.

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The rates AmerenUE will be allowed to charge its customers are based on a determination of the company's revenue requirement. A revenue requirement is based on the costs and income the company experienced during a historical test year. For this case, the test year was established as the 12-month period ending on March 31, 2008, with certain pro forma adjustments through September 30, 2008, trued-up as of September 30, 2008. That means the Commission will use the expenses and revenues measured during the test year to predict the expenses the company will be allowed to recover in future rates. Expenses that may be incurred in the future generally are not included in rate calculations.

Under traditional ratemaking procedures, at the end of the rate case the Commission establishes the rates an electric utility can charge. Once rates are established, the utility cannot change those rates without filing a new rate case and restarting the review process. However, in 2005, the Missouri legislature passed a law authorizing the Commission to establish a mechanism to allow an electric utility to make periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs.¹⁴³ The sort of mechanism envisioned by the statute is generally known as a fuel adjustment clause. AmerenUE has requested a fuel adjustment clause in this case.

Requests from Missouri electric utilities for implementation of a fuel adjustment clause are a relatively recent development because of the recent statutory change. However, fuel adjustment clauses are frequently allowed by utility commissions in other states. A chart submitted by AmerenUE's witness indicates 87 out of 94 utilities in non-restructured states, excluding Missouri, already have a fuel adjustment clause in place. Another 3 currently have a request for a fuel adjustment clause pending. Of 27 utilities with more than 50 percent coal capacity in neighboring and other non-restructured states, 26 already have a fuel adjustment clause in place.¹⁴⁴ Clearly, this statute and the accompanying rules have merely transported Missouri back into the mainstream of utility regulation. That mainstream of regulation recognizes a utility must be able to recover its prudently incurred fuel costs and that it is impossible for a utility to earn its allowed return on equity in a rising cost environment without a fuel adjustment clause.

¹⁴³ Section 386.266, RSMo (Supp. 2008).

¹⁴⁴ Lyons Rebuttal, Ex. 42, Schedule MJL-RE8.

While the new statute, Section 386.266, allows the Commission to approve a fuel adjustment clause, in effect, overturning a 1979 Missouri Supreme Court decision finding fuel adjustment clauses to be contrary to Missouri law for residential customers,¹⁴⁵ the statute does not require the Commission to approve a fuel adjustment clause. Instead, it specifically gives the Commission authority to reject a proposed fuel adjustment clause after giving an opportunity for a full hearing in a general rate case.¹⁴⁶ The statute, while not providing specific guidance on when a fuel adjustment clause should be approved, does provide some guidance on when such a clause is appropriate. Specifically, it indicates any such fuel adjustment clause must be reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity.¹⁴⁷

There are circumstances when the use of a fuel adjustment clause may be appropriate to preserve the financial health of the utility, and no one, including ratepayers, benefits when a utility becomes financially unhealthy. In an era where fuel costs are highly volatile or rapidly rising, a fuel adjustment clause may be appropriate if the company is to earn its authorized rate of return. The problem then is how to determine when a fuel adjustment clause is appropriate.

General Conclusions of Law Regarding Fuel Adjustment Clauses:

Section 386.266.1, RSMo (Supp. 2008), the statute that allows the Commission to establish a fuel adjustment clause provides as follows:

Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim energy charge or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation. The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and

¹⁴⁵ *State ex rel. Utility Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41 (Mo. banc 1979).

¹⁴⁶ Section 386.266.4, RSMo (Supp. 2008).

¹⁴⁷ Section 386.266.4(1), RSMo (Supp. 2008)

cost-effectiveness of its fuel and purchased-power procurement activities.

Subsection 4 of that statute sets out some of the provisions that must be included in a fuel adjustment clause as follows:

The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint. The commission may approve such rate schedule after considering all relevant factors which may affect the cost or overall rates and charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules:

(1) *Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity;*

(2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under-collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds;

(3) In the case of an adjustment mechanism submitted under subsections

1 and 2 of this section, includes provisions requiring that the utility file a general rate case with the effective date of new rates to be no later than four years after the effective date of the commission order implementing the adjustment mechanism. ...

(4) In the case of an adjustment mechanism submitted under subsections

1 or 2 of this section, includes provisions for prudence reviews of the costs subject to the adjustment mechanism no less frequently than at eighteen-month intervals, and shall require refund of any imprudently incurred costs plus interest at the utility's short-term borrowing rate. (emphasis added)

Subsection 4(1) is emphasized because that is the key requirement of the statute. Any fuel adjustment clause the Commission allows AmerenUE to

implement must be reasonably designed to allow the company a sufficient opportunity to earn a fair return on equity.

Subsection 7 of the fuel adjustment clause statute provides the Commission with further guidance, stating the Commission may: take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

Finally, subsection 9 of that statute requires the Commission to promulgate rules to "govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments." In compliance with the requirements of the statute, the Commission promulgated Commission Rule 4 CSR 240-3.161, which establishes in detail the procedures for submission, approval, and implementation of a fuel adjustment clause.

Is a Fuel Adjustment Clause Appropriate? Findings of Fact:

The Commission addressed the question of when a fuel adjustment clause is appropriate in AmerenUE's last rate case and in recent rate cases for two other Missouri electric utilities. In all cases, the Commission accepted three criteria for determining whether an electric utility should be allowed to implement a fuel adjustment clause. The Commission concluded a cost or revenue change should be tracked and recovered through a fuel adjustment clause if that cost or revenue change is:

1. Substantial enough to have a material impact upon revenue requirements and the financial performance of the business between rate cases;
2. beyond the control of management, where utility management has little influence over experienced revenue or cost levels; and
3. volatile in amount, causing significant swings in income and cash flows if not tracked.¹⁴⁸

¹⁴⁸ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Pages 20-21.

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After applying those criteria in AmerenUE's last rate case, the Commission found that fuel costs for AmerenUE, which derived most of its power through its own coal or nuclear-fired generating plants, were not sufficiently volatile to justify the use of a fuel adjustment clause.¹⁴⁹ In addition, the Commission was influenced by the strength of Staff's witness, Mike Proctor's, testimony suggesting AmerenUE's rising fuel costs would be at least partially off-set by rising profits from off-system sales Aquila, Inc., in contrast to AmerenUE, derived much of its power through natural gas-fired generating plants and purchased power. In those circumstances, the Commission concluded Aquila would be allowed to implement a fuel adjustment clause.¹⁵⁰ For similar reasons, the Commission allowed The Empire District Electric Company to implement a fuel adjustment clause.¹⁵¹

Applying that three-part test to AmerenUE, it is clear AmerenUE's fuel and purchased power cost is substantial. The approved Stipulation and Agreement as to Off- System Sales Issues established AmerenUE's total fuel and purchased power costs at \$735 million for the test year, which was netted against off-system sales of \$451.7 million, resulting in annual net fuel costs of \$283.3 million. The cost of fuel and purchased power is AmerenUE's largest expense, comprising 25 percent of the company's operations and maintenance expense.¹⁵² Clearly, these amounts are substantial enough to have a material impact on AmerenUE's revenue requirements and financial performance between rate cases. The first prong of the three-part test is satisfied.

The second prong of the test is whether the fuel and purchased power costs tracked in the fuel adjustment clause are largely beyond the control of AmerenUE's management. The largest portion of AmerenUE's cost to purchase fuel goes toward the purchase of Powder River Basin coal to fire its coal-fired generation plants.¹⁵³ AmerenUE buys a lot of Powder River Basin coal and Staff and other parties suggest that

¹⁴⁹ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 26.

¹⁵⁰ *In the Matter of the Tariffs of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P Increasing Electric Rates*, Report and Order, Case No. ER-2007-0004, May 17, 2007, Page 37.

¹⁵¹ *In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, Case No. ER-2008-0093 July 30, 2008, Page 40.

¹⁵² Staff Report – Cost of Service, Ex. 200, Page 60.

¹⁵³ Mantle Surrebuttal, Ex. 224, Page 2, Table LM1.

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perhaps the amount of coal AmerenUE buys would enhance its ability to negotiate coal and transportation costs.¹⁵⁴

However, no one presented a study to actually measure any influence AmerenUE might have over those costs.¹⁵⁵ On the contrary, most of the costs that comprise AmerenUE's fuel costs, the costs that would be tracked in a fuel adjustment clause, are dictated by national and international markets, including competing purchases by China and India, far beyond the control of AmerenUE. Hence, no one suggests AmerenUE can control the market price it pays for coal, diesel fuel to transport that coal, natural gas, nuclear fuel, or the effect Federal carbon legislation may have on coal prices. Neither can it control the other side of its net fuel cost, the price at which it is able to sell electricity into the off-system sales market. The second prong of the three-part test is also satisfied.

The third prong of the previously established test is whether AmerenUE's net fuel cost is volatile in amount, causing significant swings in income and cash flows if not tracked. In AmerenUE's last rate case, the Commission refused to authorize a fuel adjustment clause for AmerenUE because it found the company did not satisfy this prong of the test.¹⁵⁶ In that decision, the Commission was heavily influenced by the fact that AmerenUE's largest fuel cost is for the purchase of coal, and those coal purchases are substantially hedged for upcoming years. AmerenUE's coal purchase costs are still substantially hedged,¹⁵⁷ but the Commission's previous focus solely on coal purchase costs was misplaced. AmerenUE's net fuel cost, the amount tracked in a fuel adjustment clause, is not dependent simply on the purchase price of coal. Other factors, such as the market price for the sale of off-system power, which AmerenUE largely cannot hedge,¹⁵⁸ are very volatile. AmerenUE's witness, Shawn Schukar explained:

The variability inherent in generation availability, native load, and market prices can cause the amount and value

¹⁵⁴ Mantle Surrebuttal, Ex. 224, Page 5, Lines 9-11.

¹⁵⁵ Transcript, Page 2633, Lines 5-16.

¹⁵⁶ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 26.

¹⁵⁷ Neff Direct, Ex. 47, Page 16, Lines 1-9.

¹⁵⁸ Lyons Rebuttal, Ex. 42, Page 19, Lines 1-3.

of off-system sales to vary significantly from one period to another, both on a short-term and long-term basis.¹⁵⁹

Furthermore, through the testimony of its witness, Ajay Arora, AmerenUE was able to demonstrate that the net fuel costs AmerenUE has actually experienced over the past several years are very uncertain.¹⁶⁰ Considering all the costs and revenues that go into the calculation of AmerenUE's net fuel cost, it is apparent AmerenUE has satisfied the third prong of the three-part test.

In its report and order in the previous rate case, the Commission relied on the three-part test to conclude AmerenUE did not need a fuel adjustment clause at that time. As it has evaluated requests for approval of a fuel adjustment clause from other utilities in other rate cases, the Commission has found that the three-part test does not fully define the question of whether a fuel adjustment clause is needed. Thus, although the Commission has found that AmerenUE now satisfies the requirements of the three-part test, there are other, more persuasive reasons to approve AmerenUE's request for a fuel adjustment clause.

Section 386.266.4(1) RSMo (Supp. 2008) requires that any fuel adjustment charge approved by the Commission must be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity". While that statutory requirement specifically applies to the design of a fuel adjustment clause rather than the need to implement such a clause, it also states a good standard by which the Commission can measure the need for such a clause. In a sense, the need to provide a utility with a sufficient opportunity to earn a fair return on equity is just a summation of the end goal of the previously described three-part test. The question then becomes, does AmerenUE have a reasonable opportunity to earn a fair return on equity without a fuel adjustment clause?

An examination of recent history indicates the answer is no. AmerenUE is faced with a rising cost environment and consequently is hit hard by regulatory lag. Regulatory lag is simply the time between when the company incurs an increased cost and the time it can recover that increased cost from its customers through a rate increase. As costs rise, AmerenUE inevitably experiences a delay in being able to recover those

¹⁵⁹ Schukar Direct, Ex. 27, Page 14, Lines 16-18.

¹⁶⁰ Arora Surrebuttal, Ex. 24, Page 9, Table AKA-SR1. The numbers in the table are highly confidential.

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costs. In other words, the company must run faster toward a goal that keeps moving away.

For example, AmerenUE's cost of delivered coal increased by 12 percent from the amount used to set rates in the last rate case to the amount that will be used to set rates in this case.¹⁶¹ Delivered coal costs for the next several years, much of which has already been locked in under long-term contracts, will experience similar cost increases in future years.¹⁶² By the time the rates approved in this case go into effect, AmerenUE will have under-recovered \$114 million in coal costs since January 1, 2007.¹⁶³

Since fuel costs are the largest expense item for AmerenUE, rising fuel costs have a large effect on the company's bottom line. As a result, in recent years, AmerenUE has been unable to earn its allowed rate of return. For the period following the implementation of new rates following AmerenUE's last rate case in May 2007, through August 2008, AmerenUE was able to earn an actual return on equity of only 9.31 percent, far below its authorized return of 10.2 percent.¹⁶⁴

In its Report and Order in AmerenUE's last rate case, the Commission said, "a future rate case, not a fuel adjustment clause, is the proper means by which AmerenUE should recover its rising fuel costs."¹⁶⁵ However, simply filing more frequent rate cases cannot solve the regulatory lag problem for AmerenUE. In Missouri, rate cases generally last 11 months from the time the company files tariffs to increase rates until the Commission issues a decision about that rate increase request. So, for example, this rate case, filed in April 2008, is able to incorporate the substantial January 1, 2008 coal cost increase in AmerenUE's cost of service for consideration in this order. Those coal cost increases will be included in the rates that go into effect at the conclusion of this case on March 1, 2009. However, that means AmerenUE will not recover approximately 14 months of those increased costs. If, following the conclusion of this case, AmerenUE wants to recover its January 1, 2009 coal cost increase, it could perhaps file for its next rate increase in July 2009. Those rates would likely not go into effect until June 2010. By that

¹⁶¹ Neff Direct, Ex. 47, Page 4, Lines 1-5.

¹⁶² Neff Direct, Ex. 47, Page 4, Lines 7-13. The precise numbers are highly confidential.

¹⁶³ Lyons Rebuttal, Ex. 42, Page 2, Lines 18-20. The number in the testimony is declared to be highly confidential, but it is repeated as public information in AmerenUE's brief at page 32.

¹⁶⁴ Voss Rebuttal, Ex. 2, Page 10, Chart at line 3.

¹⁶⁵ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 26.

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time, AmerenUE would have lost 17 or 18 months of the 2009 cost increase, as well as 5 or 6 months of the 2010 increase, assuming the 2010 increase could be brought within the test year for that rate case.¹⁶⁶

When costs are steadily rising, regulatory lag clearly has a significant impact on AmerenUE's opportunity to earn a fair return on its investment. In its Report and Order in AmerenUE's last rate case, the Commission said "rising, but known fuel costs are the worst reason to implement a fuel adjustment clause...."¹⁶⁷ That statement did not take into account the fact that regulatory lag in a rising cost environment will deprive AmerenUE of an opportunity to earn a fair return on its investment. As a result, the statement is, simply, wrong.

Regulatory lag's pernicious effect on AmerenUE's ability to earn a fair return not surprisingly has an effect on the company's ability to attract investors. For all the reasons previously indicated, fuel adjustment clauses have become extremely common for regulated utilities in this country.¹⁶⁸ As a result, investors expect to see those fuel adjustment clauses in operation. The lack of a fuel adjustment clause puts AmerenUE a step behind the utilities against which it must compete for investment capital.

The credit rating agencies that evaluate AmerenUE have taken note of the company's lack of a fuel adjustment clause. In downgrading AmerenUE's investment grade in May 2008, Moody's Investor Services said:

The downgrade also reflects the challenging regulatory environment for electric utilities operating in the state of Missouri, as Union Electric is one of the relatively few utilities in the country operating without fuel, purchased power, and environmental cost recovery mechanisms. This lack of automatic cost recovery provisions creates uncertainty regarding the timely recovery of the higher costs and investments being incurred and leads to significant regulatory lag.¹⁶⁹

In issuing a credit opinion on Union Electric Corporation in August 2008, Moody's reaffirmed that opinion, stating:

¹⁶⁶ Lyons Direct, Ex. 41, Page 11, Lines 4-14.

¹⁶⁷ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 23.

¹⁶⁸ Lyons Rebuttal, Ex. 42, Schedule MJL-RE8.

¹⁶⁹ Rygh Rebuttal, Ex. 46, Page 25, Lines 9-21.

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A combination of higher operating costs, limited rate relief, and the lack of cost recovery mechanism in place has resulted in a steady decline in Union Electric's financial metrics and ratings over the last several years.

What Could Change the Rating - Up

An increase in the supportiveness of the regulatory environment for electric utilities in Missouri; the implementation of fuel, purchased power, and/or environmental cost mechanisms...

What Could Change the Rating – Down

An adverse outcome of its pending rate case, including the inability to implement a fuel adjustment clause...¹⁷⁰

Gary M Rygh, a Senior Vice President at Barclays Capital Inc., the investment banking division of Barclays Bank PLC,¹⁷¹ testifying on behalf of AmerenUE, convincingly described the problem as follows:

[T]he majority of utilities with which AmerenUE has to compete for capital benefit from the inclusion of an FAC in their ratemaking process. As I addressed earlier, that competition for capital now and in for the foreseeable future will be difficult and intense, and will be even more difficult for AmerenUE if it must compete for capital without the benefit of an FAC.

Indeed, investors, credit rating agencies and others will likely penalize AmerenUE for the risk associated with the inability to better manage the burden associated with procuring fuel for customers unless an FAC is approved for AmerenUE. In a good environment these penalties would be visible, in the current environment and the environment we expect for the foreseeable future, they could be severe. This will likely cause an increase in the cost of capital which will create a longer term and greater cost for customers. The lack

¹⁷⁰ Gordon Surrebuttal, Ex. 45, Schedule KG-SE2.

¹⁷¹ Rygh Rebuttal, Ex. 46, Page 1, Lines 7-13.

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of inclusion of a reasonable FAC will continue to keep AmerenUE in the minority of its peers who have these procedures in place and will also be going to market to raise capital.¹⁷²

It would be easy to join with Public Counsel in criticizing the credit rating agencies as “greedy and focused on short-term profits”.¹⁷³ However, while Public Counsel’s witness, Ryan Kind, may not “take a whole lot of stock in what they say as a group,”¹⁷⁴ a whole lot more investors care about what Moody’s and the other rating agencies say about AmerenUE than care about Ryan Kind’s opinion.

Right or wrong, the opinions of credit rating agencies do matter. And they matter to AmerenUE’s ratepayers as well as its investors. A further investment rating downgrade of AmerenUE would increase the company’s cost to borrow the capital it needs to meet the electricity needs of its customers. Those increased borrowing costs will ultimately be passed along to ratepayers in a future rate case.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The Commission finds that AmerenUE meets the previously described three-part test for approval of a fuel adjustment mechanism. Further, the Commission finds that the company needs a fuel adjustment clause to have a sufficient opportunity to earn a fair return on equity. Finally, the Commission finds that AmerenUE needs a fuel adjustment clause to be able to compete for capital with other utilities that already have a fuel adjustment clause. Based on those findings, the Commission authorizes AmerenUE to implement a fuel adjustment clause.

Appropriate Incentive Mechanism

Introduction:

The Commission has authorized AmerenUE to implement a fuel adjustment clause. The Commission now must define an appropriate incentive mechanism to include in AmerenUE’s fuel adjustment clause.

¹⁷² Rygh Rebuttal, Ex. 46, Page 24, Lines 1-17.

¹⁷³ Public Counsel’s Post Hearing Brief, Page 15.

¹⁷⁴ Transcript, Page 2740, Lines 3-5.

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The statute that authorizes the Commission to establish a fuel adjustment clause for AmerenUE already includes features designed to give the company an incentive to maximize its income from off-system sales and minimize its costs. Specifically, the statute requires a utility operating under a fuel adjustment clause to file a new rate case every four years, and requires the Commission to review the prudence of the company's purchasing decisions every 18 months. But regulatory reviews are only a partial substitute for the direct incentives that can result from a utility's quest for profit. Therefore, the statute allows the Commission to include features "designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities."¹⁷⁵

AmerenUE proposed the Commission use the same incentive mechanism it used when it established fuel adjustment clauses for Aquila and Empire in those companies' recent rate cases.¹⁷⁶ The fuel adjustment clause would include a 95 percent pass-through provision. That means only 95 percent of any over or under recovery balance, measured against a base level, would be passed to customers under the fuel adjustment clause. The other 5 percent would be absorbed by AmerenUE's shareholders.

Maurice Brubaker, witness for MIEC, proposed an 80 percent pass-through provision. Under his proposal, the other 20 percent of any fuel cost increase would be absorbed by AmerenUE's shareholders. Of course, shareholders would also retain 20 percent of any fuel cost decreases.¹⁷⁷ To protect shareholders and ratepayers from truly dramatic cost variations, Brubaker's proposal would also place a 50 basis point cap on the amount of cost changes that would be absorbed by AmerenUE's shareholders.¹⁷⁸

Testifying on behalf of the State, Martin Cohen also recommended an 80 percent pass through provision. Alternatively, Cohen proposed an asymmetrical provision that would give AmerenUE's shareholders an 85 percent pass through of any cost increases above the base, while giving ratepayers a 95 percent pass through of any cost decreases below the base.¹⁷⁹

¹⁷⁵ Section 386.266.1, RSMo (Supp. 2008).

¹⁷⁶ Lyons Direct, Ex. 41, Page 3, Lines 6-14.

¹⁷⁷ Brubaker Direct, Ex. 607, Page 9, Lines 2-6.

¹⁷⁸ Brubaker Direct, Ex. 607, Page 9, Lines 12-23.

¹⁷⁹ Cohen Direct, Ex. 500, Pages 23-24, Lines 20-21, 1-5.

Public Counsel, through its witness, Ryan Kind, proposed a 50 percent pass through mechanism.¹⁸⁰ AARP and the Consumers Council of Missouri did not offer any testimony on a sharing mechanism, but supported Public Counsel's proposed 50 percent pass through mechanism.¹⁸¹ Noranda also did not offer testimony on a sharing mechanism, but suggested a pass through sharing mechanism of between 75 and 90 percent.¹⁸² Staff took no position on an appropriate sharing mechanism.¹⁸³

The goal of all these pass-through plans is to ensure AmerenUE retains sufficient financial incentive to make a strong effort to reduce its fuel and purchased power costs. The statute that allows the Commission to approve a fuel adjustment clause contains some protections to ensure the electric utility acts prudently to control its costs. Notably, it requires the Commission to undertake periodic prudence reviews of the company's incurred costs.¹⁸⁴ However, an after-the-fact prudence review is not a substitute for an appropriate financial incentive, nor is an incentive provision intended to be a penalty against the company. Rather, a financial incentive recognizes that fuel and purchased power activities are very complex and there are actions AmerenUE can take that will affect the cost-effectiveness of those activities.

Findings of Fact:

The Commission finds that the 50 percent pass through proposed by Public Counsel is inappropriate because it would largely negate the effect of the fuel adjustment clause. For example, consider the \$114 million in increased coal costs that AmerenUE was unable to recover from January 1, 2007 through the March 1, 2009 presumed effective date of rates established in this case.¹⁸⁵ Under Public Counsel's proposal, AmerenUE would be able to pass through to ratepayers only half of those increased costs, and shareholders would be required to absorb the other \$57 million in increased costs. No matter how efficiently it operated, there is no evidence to suggest AmerenUE could find cost savings sufficient to balance a cost increase of that magnitude. Therefore, a 50 percent pass through operates not as an incentive, but

¹⁸⁰ Kind Rebuttal, Ex. 404, Page 6, Lines 21-23.

¹⁸¹ Transcript, Page 2139, Lines 21-25.

¹⁸² Post-Hearing Brief of Noranda Aluminum, Inc., Page 33.

¹⁸³ Transcript, Page 2616, Lines 1-6.

¹⁸⁴ Section 386.266.4(4), RSMo (Supp. 2008).

¹⁸⁵ Lyons Rebuttal, Ex. 42, Page 2, Lines 18-20.

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rather as a means to blunt the desired effect of the approved fuel adjustment clause.

The 80 percent pass through proposals offered by Brubaker and Cohen are more reasonable attempts to devise an incentive mechanism. However, those proposals would still impose more costs on AmerenUE than is necessary to provide an appropriate incentive. If AmerenUE's coal costs increased by \$137 million in 2009 and 2010 as anticipated, Brubaker's mechanism would still force AmerenUE's shareholders to absorb approximately \$25 million in coal costs alone in 2010.¹⁸⁶

A 95 percent pass through provides AmerenUE sufficient incentive to operate at optimal efficiency because the company already has several incentives in place that encourage it to minimize net fuel costs. First, AmerenUE's largest fuel cost is for the purchase of Powder River Basin coal to fire its power plants.¹⁸⁷ The coal AmerenUE uses is purchased by an affiliated company, AmerenEnergy Fuels and Service Company, which also purchases coal for the unregulated Ameren merchant generating companies operating in Illinois. As a result, AmerenUE pays the same price for coal as the unregulated affiliates.¹⁸⁸ Presumably, Ameren has a strong incentive to minimize costs for its unregulated operations, so AmerenUE would benefit from those same incentives.

Second, AmerenUE's key employees responsible for managing the company's net fuel costs all have personal financial performance incentives related to things like generation levels, generation availability, and cost of generation.¹⁸⁹ Thus, individual employees have a financial incentive to minimize the company's fuel costs.¹⁹⁰

Third, adjustments under the fuel adjustment clause are based on historical rather projected costs. Hence, AmerenUE will not entirely escape the incentive effects of the regulatory lag between the incurrence of its fuel costs and the recovery of those increased fuel costs from ratepayers under the fuel adjustment clause. Therefore, the company has

¹⁸⁶ Lyons Rebuttal, Ex. 42, Page 24, Lines 13-16, as corrected at Transcript, Page 2141.

¹⁸⁷ Mantle Surrebuttal, Ex. 224, Page 2, Table LM1.

¹⁸⁸ Lyons Rebuttal, Ex. 42, Page 21, Lines 3-9.

¹⁸⁹ Transcript, Pages 2179-2180, Lines 23-25, 1-5.

¹⁹⁰ Lyons Rebuttal, Ex. 42, Page 23, Lines 9-17.

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an incentive to minimize net fuel costs to mitigate that remaining regulatory lag.¹⁹¹

Fourth, as required by the Commission's rules, AmerenUE's fuel adjustment clause includes a detailed heat rate/efficiency testing plan that will allow the Commission to guard against imprudent operation and maintenance of the company's generating units, thus controlling net fuel costs.

Fifth, AmerenUE will need to come back to the Commission in its next rate case to have its fuel adjustment clause renewed. As the Commission has previously indicated, "a fuel adjustment clause is a privilege, not a right, which can be taken away if the company does not act prudently."¹⁹² If AmerenUE does not efficiently control its net fuel costs, the Commission could reconsider the fuel adjustment clause.

There is one additional consideration that supports the implementation of a 95 percent pass through provision in AmerenUE's fuel adjustment clause. That is the likely impact the pass through provision will have on AmerenUE credit worthiness in the eyes of Wall Street. The Commission has recently allowed two other Missouri electric utilities, Aquila and Empire, to implement a fuel adjustment clause including a 95 percent pass through provision. To now impose a less favorable pass through provision on AmerenUE would signal investors that AmerenUE was less well regarded by this regulatory agency.¹⁹³ When asked specifically about the 80 percent pass through proposal offered by MIEC, AmerenUE's witness, Wall Street investment banker, Gary Rygh, said he would not be comfortable with that proposal because "the markets are looking for bad news ... that would be a fairly tough thing for them to swallow."¹⁹⁴

The key from the perspective of investors and the rating agencies is that AmerenUE's fuel adjustment clause must be in the mainstream of regulation. Most fuel adjustment clauses in use around the county provide for a 100 percent pass through of costs.¹⁹⁵ To allow substantially less than a 100 percent pass through would push

¹⁹¹ Lyons Rebuttal, Ex. 42, Page 22, Lines 3-15.

¹⁹² *In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, Case No. ER-2008-0093 July 30, 2008, Pages 45-46.

¹⁹³ Transcript, Pages 2370-2371, Lines 23-25, 1-8. Also, Transcript, Pages 2384-2385, Lines 14-25, 1-7.

¹⁹⁴ Transcript, Page 2374, Lines 18-21.

¹⁹⁵ Transcript, Page 2369, Lines 22-23.

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AmerenUE's fuel adjustment clause out of the mainstream and hurt the company's efforts to compete for needed capital.

Some parties argue rating agencies and investors simply look to see whether a fuel adjustment clause is in place and do not concern themselves with the operational details of the clause. In support of this idea they offer the testimony of AmerenUE's rate of return witness, Dr. Roger Morin, who, when asked whether rating agencies essentially view fuel adjustment clauses as either present or not present, replied in the affirmative and indicated such agencies typically do not get into the details of the clause.¹⁹⁶

However, Dr. Morin's response must be read in the context of earlier questioning regarding rating agencies concern or lack of concern about the technical details of fuel adjustment clauses such as timing and duration of accumulation and recovery periods.¹⁹⁷

As a result, Dr. Morin's comment should not be interpreted as suggesting something as significant as a pass through percentage would not be considered by the rating agencies.

Indeed, Dr. Morin also testified that the terms of a fuel adjustment clause are important to the credit rating agencies, saying, "I think they would be concerned with a marked deviation from the conventional practice of one to one (pass through of all fuel costs). They would look at the terms of the adjustment clause."¹⁹⁸ MIEC's rate of return witness, Michael Gorman, also testified that in his opinion, "rating agencies are capable of understanding a fuel adjustment clause and understanding the – the effect of that clause in allowing a utility to produce the cash flows necessary to support financial obligations."¹⁹⁹

Conclusions of Law:

The Commission rule that requires AmerenUE to submit a heat rate/efficiency testing plan as part of its proposed fuel adjustment clause is 4 CSR 240-3.161(2)(P).

Decision:

AmerenUE's fuel adjustment charge shall include an incentive clause providing that 95 percent of any deviation in fuel and purchased power costs from the base level shall be passed to customers and 5

¹⁹⁶ Transcript, Pages 382-383, Lines 20-25, 1-2.

¹⁹⁷ Transcript, Pages 362-365.

¹⁹⁸ Transcript, Page 459, Lines 14-21.

¹⁹⁹ Transcript, Page 545, lines 15-19.

percent shall be retained by AmerenUE. This incentive clause will give AmerenUE a sufficient opportunity to earn a fair return on equity as required by Section 386.266 and the Hope and Bluefield decisions. At the same time, it will protect AmerenUE's customers by giving the company an incentive to be prudent in its decisions by not allowing all costs to simply be passed through to customers.

Rate Design of the Fuel Adjustment Clause:

The details of the tariff that will actually implement AmerenUE's fuel adjustment clause are established through the Stipulation and Agreement as to All FAC Tariff Rate Design Issues, which the Commission approved in an order issued on December 30, 2008.

8. Callaway 2 COLA Costs

Introduction:

During the test year, AmerenUE spent \$45,987,000 to prepare and file a Construction and Operating License Application (COLA) with the Nuclear Regulatory Commission, seeking approval to construct a second nuclear reactor at the company's Callaway Nuclear Plant.²⁰⁰ AmerenUE proposes to adjust its accounts to move that approximately \$46 million into its plant in service account.

That means the COLA cost would be moved into the company's rate base so that AmerenUE would earn a return on that investment.²⁰¹ That \$46 million would not be subject to depreciation until the Callaway 2 plant is actually in operation, so AmerenUE would not immediately receive a return of its investment.²⁰² As a result, if AmerenUE's proposed adjustment is accepted, the inclusion of the \$46 million in the company's rate base would have the effect of increasing AmerenUE's cost of service by approximately \$5 million per year, the exact amount depending upon the rate of return the Commission authorizes in this case. Several parties oppose AmerenUE's proposal to move the \$46 million into rate base as a violation of section 393.135, RSMo, frequently known as the anti- CWIP initiative.

Findings of Fact:

AmerenUE is currently accounting for the Callaway 2 COLA costs as Construction Work in Progress, generally known by the acronym CWIP,

²⁰⁰ Weiss Supplemental Direct, Ex. 11, Page 8, Lines 6-7.

²⁰¹ Transcript, Page 1300, Lines 6-10.

²⁰² Transcript, Page 1300, Lines 11-24.

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just as it would any other capital project that is not yet complete.²⁰³ A utility does not earn a return on investments held as CWIP until the project for which the investment is made is actually placed in service.²⁰⁴ However, AmerenUE is allowed to calculate AFUDC (allowance for funds used during construction) on the project until it is complete.²⁰⁵ AFUDC represents the financing cost associated with construction projects, and when the project is complete, the company will earn a return on the cost of the project, including AFUDC.²⁰⁶

For purposes of this rate case, AmerenUE's senior management, presumably AmerenUE's President and Chief Executive Officer, Thomas R. Voss, decided that it would be appropriate to include the Callaway 2 COLA costs in rate base and instructed the company's accountants to make a pro forma adjustment to accomplish that change.²⁰⁷

The costs associated with the Callaway 2 COLA are properly accounted for as CWIP, as a necessary construction related cost to operate the Callaway 2 reactor.²⁰⁸ This is the same accounting treatment the Commission afforded AmerenUE's cost to obtain the operating permit to build the Callaway 1 plant in the 1970s and 1980s.²⁰⁹

Missouri's statutes include a provision that explicitly prohibits the inclusion of cost of construction work in progress in rates before the project is fully operational and used for service.²¹⁰ AmerenUE attempts to avoid the statute's prohibition on the inclusion of CWIP in rates by arguing that the Callaway 2 COLA costs are not CWIP because the NRC's permit to build Callaway 2 might have some independent value apart from the permission to construct the nuclear reactor. In that regard, Thomas Voss, AmerenUE's president and chief executive officer, compared the Callaway 2 COLA to real estate that would be purchased in advance and held for later development.²¹¹

The supposed independent value of the COLA is based on the eligibility for certain federal tax credits afforded by the filing of the COLA in 2008. The federal Energy Policy Act (EPAct) creates potential tax savings that could save AmerenUE and its ratepayers a total of \$500

²⁰³ Rackers Surrebuttal, Ex. 202, Page 4, Lines 20-22.

²⁰⁴ Transcript, Page 1297, Lines 9-24.

²⁰⁵ Transcript, Page 1298, Lines 3-7.

²⁰⁶ Rackers Surrebuttal, Ex. 202, Page 3, Lines 17-18.

²⁰⁷ Transcript, Page 1298, Lines 12-24.

²⁰⁸ Rackers Surrebuttal, Ex. 202, Pages 4-5, Lines 21-23, 1-2.

²⁰⁹ Rackers Surrebuttal, Ex. 202, Page 5, Lines 5-10.

²¹⁰ Section 393.135, RSMo 2000.

²¹¹ Transcript, Page 128, Lines 20-23.

million over eight years if the Callaway 2 unit is ultimately built. Since EPCAct required a COLA be filed and docketed with the NRC on or before December 31, 2008, to be eligible to receive those tax credits, AmerenUE's COLA might have an independent value if AmerenUE later decided to sell the right to build Callaway 2 as a merchant plant.²¹²

However, any independent value of the COLA is highly speculative since, so far as AmerenUE's witness was aware, no COLA has ever been sold.²¹³ In any event, even if the COLA was treated as an asset to be held for future use, that does not allow that asset to be put into rate base, until it is actually in use. That is particularly true where, as here, AmerenUE has no definite plan to either build Callaway 2 or attempt to sell the COLA to a merchant plant operator.²¹⁴

Even if the COLA has some independent value, it is no different from a turbine that AmerenUE might purchase in anticipation of ultimately installing it as part of Callaway 2 or for some other project, or even for eventual resale to some other utility. That turbine would not be included in rate base until it was actually used to generate electricity, despite its undeniable independent value.²¹⁵ If that turbine could not be included in rate base, AmerenUE did not make a convincing argument that the COLA should be included in rate base at this point in time.

Conclusions of Law:

In 1976, Missouri's voters passed an initiative that was codified as Section 393.135, RSMo 2000. That section provides as follows:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

That statute clearly and explicitly forbids the inclusion of CWIP in an electric utility's rates until the construction work is complete and the project is fully operational and used in service.

²¹² Transcript, Page 129, Lines 1-5.

²¹³ Transcript, Page 1320, Lines 19-21.

²¹⁴ Transcript, Page 1309, Lines 5-23.

²¹⁵ Transcript, Page 253, Lines 1-7.

Decision:

AmerenUE contends the inclusion of the Callaway 2 COLA costs in rate base is simply a means by which ratepayers should be required to bear their fair share of the cost and risk associated with the COLA. Whatever the merits of that proposition, AmerenUE's argument is unconvincing because when Missouri's voters passed the initiative that became Section 393.135, RSMo, they determined a utility would have to wait until a plant was completed and in service before it could recover the cost of its investment. The costs associated with AmerenUE's preparation and filing of the Callaway 2 COLA are properly treated as CWIP and as such they may not be included in AmerenUE's rate base until the Callaway 2 plant is fully operational and used for service.

9. MISO Day 2 Charges**Introduction:**

AmerenUE participates in the Midwest ISO, which is a regional transmission organization that jointly operates the transmission systems of its member utilities. Midwest ISO also operates a day-ahead and real-time energy market, referred to as MISO Day 2. In operating that market, Midwest ISO sometimes has to dispatch a utility's generation assets in a manner required to meet the reliability needs of the system while not actually selling any power. In those circumstances, Midwest ISO compensates the affected utilities by making Revenue Sufficiency Guarantee (RSG) payments to the utilities for the use of the assets, and collecting RSG charges from the other member utilities to cover those payments.²¹⁶

Midwest ISO began operating its Day 2 market on April 1, 2005. Subsequently, the Federal Energy Regulatory Commission (FERC) ruled Midwest ISO had not properly followed its tariff when it charged its members for RSG, and ordered the Midwest ISO to resettle those RSG transactions. As a result of that resettlement, in 2007, Midwest ISO billed, and AmerenUE paid, \$12,430,094 for additional RSG charges relating to the period of 2005 and 2006.²¹⁷

AmerenUE proposes to amortize these resettlement RSG charges over two years and recover them in rates at approximately \$6.1 million per year.²¹⁸ Staff opposes the recovery of these charges because the expenses relate to charges incurred in the two years prior

²¹⁶ Staff Report – Cost of Service, Ex. 200, Page 23.

²¹⁷ Weiss Rebuttal, Ex. 12, Page 6, Lines 8-15.

²¹⁸ Weiss Rebuttal, Ex. 12, Page 6, Lines 18-20.

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to the test year and because the charges are not recurring and thus will not cause expenses to be higher in future years.²¹⁹

Findings of Fact:

There is very little dispute about the fact regarding this issue. The \$12.4 million resettlement imposed on AmerenUE by Midwest ISO covered the period of April 1, 2005, through December 2006.²²⁰ AmerenUE actually paid that resettlement amount to Midwest ISO in April 2007,²²¹ which was within the test year for this case.²²² Furthermore, although Midwest ISO frequently imposes smaller resettlements, there is no indication AmerenUE will be required to make a resettlement payment of this magnitude in the future.²²³

It is also clear that the Commission has approved AmerenUE's participation in the Midwest ISO, and no one has questioned the prudence of that participation.²²⁴ AmerenUE was required to make the resettlement RSG payment by the terms of the Midwest ISO tariff.²²⁵ The resettlement was necessary because Midwest ISO did not properly follow its tariff in 2005 and 2006, not because AmerenUE did anything wrong.²²⁶

If Midwest ISO had properly followed its tariff and charged AmerenUE the correct amount in 2005 and 2006, an additional \$6.2 million would have been included in AmerenUE's annual revenue requirement in its last rate case and would have been recovered from ratepayers during the last two years.²²⁷ If Staff's position is adopted, AmerenUE would be precluded from recovering the \$12.4 million resettlement cost and the company's shareholders would be required to absorb that entire cost.²²⁸ A \$12 million expense that cannot be recovered from ratepayers would reduce AmerenUE's actual return on equity by approximately 24 basis points.²²⁹ Staff agrees such an impact on AmerenUE's earnings would be significant.²³⁰

²¹⁹ Hagemeyer Surrebuttal, Ex. 222, Page 7, Lines 1-10.

²²⁰ Transcript, Page 778, Lines 18-19.

²²¹ Transcript, Page 779, Lines 4-5.

²²² Transcript, Page 801, Lines 16-18.

²²³ Transcript, Page 790, Lines 2-12.

²²⁴ Transcript, Page 809, Lines 7-18.

²²⁵ Transcript, Page 801, Lines 19-22.

²²⁶ Transcript, Pages 801-802, Lines 23-25, 1-6.

²²⁷ Transcript, Page 803, Lines 20-25.

²²⁸ Transcript, Page 807, Lines 18-25.

²²⁹ Transcript, Page 796, Lines 9-15.

²³⁰ Transcript, Page 809, Lines 4-6.

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Staff's reason for excluding the cost is that the resettlement cost is non-recurring.²³¹ That means if the larger amount is included in rates, there is a possibility AmerenUE will be able to over-recover its costs, to the detriment of ratepayers.²³² However, that over-recovery is only possible if AmerenUE waits more than two years to file its next rate case. As has been noted elsewhere in this order, given the rising cost environment facing AmerenUE, it is unlikely the Company will wait more than two years to file its next rate case.²³³

Conclusions of Law:

Since AmerenUE paid the Midwest ISO resettlement charge during the test year, it does not need to obtain an accounting authority order to bring this expense into the rate case. As a result, the accounting standards used to consider the granting of an accounting authority order do not apply. Because this is a test year expense, the Commission has a great deal of discretion when deciding whether to include this expense when setting AmerenUE's revenue requirements for ratemaking purposes.

Decision:

Under the circumstances of this case, fundamental fairness requires that AmerenUE be allowed an opportunity to recover the \$12.4 million RSG resettlement cost, which was incurred in the test year and was necessitated by the failure of the Midwest ISO to follow its tariff. AmerenUE's proposal to amortize that amount over two years is a reasonable means to allow that recovery to take place, and that proposal is approved.

10. Incentive Compensation

Introduction:

AmerenUE chooses to pay a portion of its employee compensation as incentive pay. That is, the employees receive that portion of their compensation only if they, or the company, meet certain goals. The compensation in question is, for the most part, not a bonus program restricted to top executives, but rather is a portion of the market-based pay for ordinary employees. AmerenUE offers a total rewards package to its employees, which includes both base pay and incentive pay

²³¹ Transcript, Pages 816-817, Lines 25, 1-3.

²³² Transcript, Page 792, Lines 5-16.

²³³ Transcript, Page 791, Lines 17-23.

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programs, to attract talent and remain competitive with other employers.²³⁴

AmerenUE offers several different incentive pay plans, divided into the general categories of long-term compensation, short-term compensation, and an exceptional performance bonus program.²³⁵ Staff would entirely disallow the cost of the long-term compensation program and the exceptional performance bonus program, but would allow a small portion of the short-term compensation program.²³⁶ The Commission will separately consider the three categories of incentive compensation.

Findings of Fact:

Long-Term Compensation:

AmerenUE's long-term compensation plans are offered to members of the Ameren Leadership Team, which includes Officers, Directors, and Managers.²³⁷ AmerenUE's witness indicated, "the purpose of a long-term incentive plan is to ensure that the Company's leaders are focused not only on the short-term success of the organization, but also on the long-term success of the organization."²³⁸ The long-term compensation programs attempt to meet that goal by offering stock options, or other means by which executives are given an equity stake in the business.²³⁹

Ameren offered a restricted stock plan from 2001 through 2005, and replaced that program with the Performance Share Unit Program in 2006. The restricted stock program gave participants annual grants of stock that vested over a 7-year period based on earnings performance. The Performance Share Unit Program gives participants annual performance share units, which allows them to receive stock if certain performance criteria are met.²⁴⁰ Eligibility for both long-term incentive programs are based on measures of earnings per share or of total shareholder return.²⁴¹

The Commission has frequently disallowed costs relating to incentive programs that are based on measures of the financial return achieved by the utility. It has done so because such measures are

²³⁴ Bauer Rebuttal, Ex. 25, Page 8, Lines 7-9.

²³⁵ Bauer Rebuttal, Ex. 25.

²³⁶ Hagemeyer Surrebuttal, Ex. 222.

²³⁷ Bauer Rebuttal, Ex. 25, Page 5, Chart at Line 3.

²³⁸ Bauer Rebuttal, Ex. 25, Page 19, Lines 4-6.

²³⁹ Bauer Rebuttal, Ex. 25, Page 19, Lines 6-7.

²⁴⁰ Bauer Rebuttal, Ex. 25, Page 20, Lines 1-4.

²⁴¹ Bauer Rebuttal, Ex. 25, Page 5, Chart at Line 3.

based on the level of profits the utility can achieve. At best, a utility's level of profitability has little or no benefit for ratepayers. At worst, an increase in the utility's profitability may be harmful to ratepayers if that profitability is obtained by cutting customer service or system maintenance to cut costs and thereby increase earnings per share. Because eligibility for AmerenUE's long-term compensation plans are based on measures of the financial return achieved by the utility, the cost of those plans should fall on the shareholders who will primarily benefit from the company's increased financial return.

Short-Term Incentive Plans:

AmerenUE offers several short-term incentive plans for various groups of employees. One, the Executive Incentive Plan for Officers, is entirely funded by a measure of earnings per share. AmerenUE is not seeking to recover the cost of that program through rates.²⁴² The other short-term incentive programs are the Executive Incentive Plan for Managers and Directors (EIP-M), the Ameren Management Incentive Plan (AMIP), the Ameren Marketing, Trading and Commodities Plan (AMTC) and the Ameren Incentive Plan (AIP).²⁴³ Except for the EIP-M for members of the Ameren Leadership Team below the Officer level, which is 25 percent funded by earnings per share, these short-term compensation plans are not measured by the company's earnings per share. Rather, they are funded based on the employee's achievement of pre-defined Key Performance Indicators (KPIs).²⁴⁴

The KPIs are part of a system AmerenUE has developed to communicate specific goals to its employees and to drive the performance of those employees.²⁴⁵ The KPIs focus on four critical areas: financial management of the business, process improvement, the customer, and employees.²⁴⁶ Each functional group within AmerenUE develops a scorecard of KPIs that will contribute to the overall performance of AmerenUE.²⁴⁷ Every individual employee receives a scorecard containing from 4 to 6 KPIs.²⁴⁸ Individual KPIs are designed to

²⁴² Bauer Rebuttal, Ex. 25, Page 15, Lines 11-22.

²⁴³ Bauer Rebuttal, Ex. 25, Page 5, Chart at Line 1.

²⁴⁴ Bauer Rebuttal, Ex. 25, Page 5, Chart at Line 1.

²⁴⁵ Bauer Rebuttal, Ex. 25, Page 4, Lines 13-14.

²⁴⁶ Bauer Rebuttal, Ex. 25, Page 10, Lines 4-6.

²⁴⁷ Bauer Rebuttal, Ex. 25, Page 10, Lines 7-10.

²⁴⁸ Transcript, page 1422, Lines 11-13.

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focus the employee's attention on such things as increased reliability, customer satisfaction, safety, or operational performance.²⁴⁹

Each KPI includes three levels of performance. The first level of performance is called "threshold," and it represents the "minimum acceptable level of goal achievement for any given KPI."²⁵⁰ At the hearing, AmerenUE's witness clarified that the "threshold" level of performance represents "a continuous improvement toward a goal", not just the minimum an employee must do to keep their job.²⁵¹ Beyond the "threshold" level, an employee's performance can reach the "target" level, which is a stretch goal that employees are striving to achieve.²⁵² Finally, if an employee does very well, they might reach the "maximum" level, which represents a level of performance that is very difficult to achieve.²⁵³ As an employee, or a team of employees moves up in level of performance their incentive compensation will increase.²⁵⁴

Staff does not entirely oppose the KPI concept and the short-term compensation program, but for various reasons would disallow most of the costs related to that program.²⁵⁵ Specifically, Staff would disallow payments made under certain KPIs because they were based on what Staff called financial metrics or what Staff described as project based metrics. In addition, Staff would disallow incentive payments made for performance that reached the "threshold" level, but did not reach the "target" level.²⁵⁶

Before examining Staff's reasons for disallowing part of the cost of the short-term compensation program, it is important to look at the qualifications of the witnesses presented by Staff and AmerenUE. AmerenUE's witness was Krista Bauer. Ms. Bauer is employed by Ameren Services Company as Manager, Compensation and Performance.²⁵⁷ She holds a Masters Degree in Industrial/Organizational Psychology from Southern Illinois University in Edwardsville, and she will complete her MBA from Webster University in October of 2009. She has eleven years of human resources experience and has served as

²⁴⁹ Bauer Rebuttal, Pages 11-14.

²⁵⁰ Bauer Rebuttal, Ex. 25, Page 10, Lines 11-12.

²⁵¹ Transcript, Page 1416, Lines 12-17.

²⁵² Bauer Rebuttal, Ex. 25, Page 10, Line 13.

²⁵³ Bauer Rebuttal, Ex. 25, Page 10, Lines 14-15.

²⁵⁴ Transcript, Page 1425, Lines 9-15.

²⁵⁵ Staff would allow less than \$527,000 into rates, approximately 2 percent of AmerenUE's total incentive compensation costs. Transcript, Page 1501, Lines 1-10.

²⁵⁶ Transcript, Page 1510, Lines 2-19.

²⁵⁷ Bauer Rebuttal, Ex. 25, Page 1, Lines 10-11.

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adjunct faculty at St. Louis University between 2000 and 2005, where she taught courses in Industrial Psychology.²⁵⁸

Staff's witness was Jeremy Hagemeyer. He has been a Utility Regulatory Auditor within the Auditing Department of the Commission's Staff since 2002. He has a Bachelor of Science degree in Accounting and German from Southwest Missouri State University, and an MBA from Fontbonne University.²⁵⁹ Although Mr. Hagemeyer was a bright and articulate witness for Staff on several issues in this case, he has no real expertise in evaluating or designing a compensation plan for a major utility.²⁶⁰

Yet, Mr. Hagemeyer offered testimony suggesting that payments made under specific KPIs, which are part of the overall compensation plan designed by AmerenUE, should, or should not be recovered through rates. Not surprisingly, his standards for deciding what should be recovered and what should be disallowed were rather vague and do not provide the Commission with any real basis to judge the plan. Furthermore, his proposal to disallow all payments for performance that met only the threshold level of the plan clearly misunderstood the intent of the plan. As Ms. Bauer explained, "threshold" is a description of the level of improvement at which incentive compensation is earned. It does not represent the minimum an employee must do to keep their job.

Staff should not be in the business of trying to design a compensation plan for AmerenUE. Staff is not qualified to do so and its attempts to manage the affairs of AmerenUE are inappropriate. That does not mean that anything goes for the company. Staff certainly must evaluate AmerenUE's incentive compensation plans. However, it must do so at a higher level and not get bogged down in the details. AmerenUE's incentive programs must stand or fall as a program. If the overall program is appropriate, AmerenUE should be able to recover the costs of that program through rates. If the overall program is unacceptable, then the entire program will be excluded from rates. The Commission will not attempt to manage the details of those programs.

Looking at the short-term compensation programs as a whole, the Commission finds them to be appropriate for recovery through rates. Incentive compensation programs are very common in business in

²⁵⁸ Bauer Rebuttal, Ex. 25, Page 2, Lines 8-16.

²⁵⁹ Staff Report – Cost of Service, Ex. 200, Background, Education and Credentials, Page 18.

²⁶⁰ Transcript, Pages 1468-1471.

general and in the utility industry in particular. Among AmerenUE's peer utility companies, 36 out of 37 offer short-term incentive plans for their executives.²⁶¹ Thus, AmerenUE needs to offer similar plans to compete for employees with other utilities.

For example, if AmerenUE's research determines that the market rate for a certain position is \$60,000 per year, it will evaluate the appropriate base-level of compensation and determine an appropriate amount that should be offered through incentive compensation.²⁶² It is clear that if AmerenUE simply abandoned its incentive plan and offered market rates as base pay, it would have no difficulty in recovering all those costs through rates.²⁶³ However, AmerenUE has chosen to implement an incentive compensation plan so that it has the ability to reward its employees for achieving the performance goals set by the company. So long as the overall program does not contain incentives that could be harmful to ratepayers, such as the purely financial incentives that caused the Commission to disallow recovery of AmerenUE's long-term compensation plan, AmerenUE should be able to recover the costs of incentive compensation through rates.

The Commission finds that the overall KPI system described in the testimony is likely to bring improvements in employee performance that will benefit AmerenUE's ratepayers as well as the company's shareholder. The Commission will allow AmerenUE to recover the cost of those short-term incentive compensation programs through rates.

The Exceptional Performance Bonus Plan:

The final program within AmerenUE's incentive compensation package is known as the Exceptional Performance Bonus Plan. That program applies to 868 management employees below the level of the Ameren Leadership team.²⁶⁴ The program allows a supervisor to recommend an employee receive a bonus for exhibiting superior performance above and beyond what is expected of them. The supervisor's recommendation is reviewed by senior leadership for review and approval. Awards under the plan generally range from \$500 to \$3,000.²⁶⁵ Many of the rewards are given for exceptional performance that directly benefits AmerenUE's customers, such as exceptional performance

²⁶¹ Bauer Rebuttal, Ex. 25, Page 6, Lines 11-14.

²⁶² Bauer Rebuttal, Ex. 25, Page 8, Lines 9-15.

²⁶³ Transcript, Page 1546, Lines 11-15.

²⁶⁴ Bauer Rebuttal, Ex. 25, Page 17, Lines 17-23.

²⁶⁵ Bauer Rebuttal, Ex. 25, Pages 17-18, Lines 23, 1-3.

at restoring power after an ice storm.²⁶⁶ Staff opposes AmerenUE's recovery of the cost of this program because the program lacks specific criteria by which awards are to be given.²⁶⁷

The lack of specific criteria for the program is actually the point of the program. It exists so that unusual and unanticipated exceptional effort can be rewarded. The program could certainly encourage outstanding customer service and exceptional performance that would benefit ratepayers and the company as a whole. However, if not run properly, the program could degenerate into a means by which extra money is funneled to management favorites, without any benefit to the company or to ratepayers. The Commission will allow the program to be included in rates, but will direct AmerenUE to maintain proper records of payments made under the program so that Staff can review it in AmerenUE's next rate case.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The Commission finds that AmerenUE shall recover in rates the cost of its short-term incentive compensation programs and the cost of its Exceptional Performance Bonus Plan. Taken as a whole, those programs are likely to benefit AmerenUE's ratepayers as well as its shareholders. However, AmerenUE shall not recover in rates the cost of its long-term compensation plan, which the Commission finds will primarily benefit shareholders and not ratepayers.

11. Depreciation**Introduction:**

Depreciation is the means by which a utility is able to recover the cost of its investment in its rate base by recognizing the reduction in value of that property over the estimated useful life of the property. AmerenUE's current depreciation rates were established by the Commission in AmerenUE's last rate case, Case Number ER-2007-0002. Public Counsel contends the Commission should adjust downward the established depreciation rates for five specific accounts for the

²⁶⁶ Bauer Rebuttal, Ex. 25, Page 18, Lines 3-18.

²⁶⁷ Hagemeyer Surrebuttal, Ex. 222, Page 3, Lines 21-22.

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Callaway Nuclear Production Plant.²⁶⁸ Staff and AmerenUE agree the Commission should not “cherry pick” a few isolated accounts to adjust outside the context of a complete depreciation study, which was not conducted for this case.

Findings of Fact:

A complete depreciation study requires an actuarial analysis of the complete mortality records of all plant account assets owned by the company.²⁶⁹ Such a depreciation study was performed in AmerenUE's last rate case, ER-2007-0002, and the depreciation rates that resulted from that case have only been in effect since June 1, 2007.²⁷⁰

Not surprisingly, complete depreciation studies are expensive and time consuming. Such a study may involve site visits, interviews, data and actuarial analysis, and the production of reports and testimony.²⁷¹ That is one of the reasons, the Commission's rules require such depreciation studies to be done only periodically, and not necessarily for every rate case.²⁷² AmerenUE submitted a complete depreciation study in July 2006, as part of its last rate case, covering the period through December 31, 2005. As a result, AmerenUE's next complete depreciation study would be due in July 2011, unless it files a new rate case after July 2009, in which case a new depreciation study would have to be filed with the rate case.²⁷³ AmerenUE did not submit a depreciation study in this case.

Public Counsel also did not submit a complete depreciation study in this case. However, through the testimony of its witness, William Dunkel, Public Counsel asks the Commission to order changes to five particular depreciation accounts. Dunkel contends there is a mismatch in these accounts because the approved depreciation rates are calculated using a theoretical reserve instead of actual book reserve.²⁷⁴

Dunkel explains that since the Callaway plant was built, depreciation rates have been based on an assumption that the nuclear plant would have a life of 40 years, which was the length of its license

²⁶⁸ Dunkel Direct, Ex. 400, Schedule WWD-1. The affected accounts are 321 Structures and Improvements, 322 Reactor Plant Equipment, 323 Turbogenerator Units, 324 Accessory Electrical Equipment, and 325 Miscellaneous Power Plant Equipment.

²⁶⁹ Gilbert Rebuttal, Ex. 209, Page 3, Lines 13-14.

²⁷⁰ Gilbert Rebuttal, Ex. 209, Page 3, Lines 14-16.

²⁷¹ Transcript, Pages 864-865, Lines 18-25, 1.

²⁷² Transcript, Page 865, Lines 14-18.

²⁷³ Weidmayer Rebuttal, Ex. 13, Page 5, Lines 8-14.

²⁷⁴ Dunkel Direct, Ex. 400, Page 5, Lines 9-11.

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from the NRC. However, in the last rate case, the Commission ordered the depreciation rates regarding the Callaway plant be calculated based on a 60- year life span, assuming that AmerenUE would seek and receive a 20-year license extension from the NRC. The actual book reserve, which is based on past depreciation that assumed a 40 year life, is now higher than theoretical reserve, which is based on an assumed 60 year life.²⁷⁵ Dunkel argues the theoretical reserve and the book reserve should be brought back into balance by adjusting the depreciation rates for the five specified accounts and reducing AmerenUE's depreciation expense by approximately \$7.1 million per year.²⁷⁶

Staff and AmerenUE contend no adjustment should be made at this time without the benefit of a full depreciation study. The Commission finds that Staff and AmerenUE are correct in their concern about making an isolated adjustment to a few depreciation accounts outside the context of a full depreciation study. Such an isolated adjustment is closely analogous to the larger concept of single-issue ratemaking. Just as it would be inappropriate to adjust a utility's rates based on a change to a single item without considering changes in all other items that may off-set that single item, it would be inappropriate to adjust a few depreciation rates without looking at all depreciation rates in a complete study. In a complete study, depreciation rates for some accounts may increase, while others decrease. The balance of the increases and decreases is what is important in establishing depreciation rates for the company.

The Commission did look at a complete depreciation study in the last rate case. Furthermore, the parties to that case were aware of the difference between theoretical reserve and book reserve. A Staff witness brought that imbalance to the Commission's attention, but at that time,

²⁷⁵ Dunkel Direct, Ex. 400, Page 14, Lines 1-16. AmerenUE's witness describes "theoretical reserve" and "book reserve" as follows:

The theoretical reserve, also known as the calculated accrued depreciation, is as its name implies a calculated amount or reserve and is a function of the age of the electric plant in service and the depreciation parameters selected. The theoretical reserve is commonly used in industry practice as a benchmark to assess the adequacy of a company's book reserve. The theoretical reserve is a calculated amount made at a particular point in time. The Company's accumulated depreciation or "book reserve" is the sum of actual monthly charges that have been recorded by the Company throughout its history to accumulated depreciation for items such as depreciation accruals, salvage, cost of retiring, retirements, etc.

Wiedmayer Rebuttal, Ex. 13, Page 13, Lines 5-12.

²⁷⁶ Dunkel Direct, Ex. 400, Page 17, Lines 7-11.

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Staff advised the Commission to simply monitor the imbalance for possible correction in a future depreciation study. No party, including Public Counsel, proposed any adjustment regarding that imbalance in that case.²⁷⁷

Public Counsel's witness claims an adjustment should be made in this case because of a "major change" since the last rate case. The "major change" he describes is AmerenUE's announcement that it will, indeed, be filing an application to extend the Callaway plant's NRC license by another 20 years.²⁷⁸ However, AmerenUE's filing of the application to extend the license of the Callaway plant is not a "major change" from the last rate case. It is not a change at all. The question of whether Callaway's service life should be extended for 20 years for depreciation purposes was certainly an issue in the last rate case, and the Commission emphatically ordered that the plant's service life should be extended.²⁷⁹ Therefore, the 60-year life-span assumption for the Callaway plant was already in place when rates were set in the last case. AmerenUE's decision to actually apply for a license extension changes nothing.

Public Counsel's witness also claims that an immediate change to the depreciation rate for these five accounts is necessary because the imbalance between the actual and theoretical reserve has "grown drastically" since the last case.²⁸⁰ However, Dunkel actually testified that the actual Callaway book reserve in 2005, measured at Commission approved depreciation rates, was \$219 million above the theoretical reserve. By December 31, 2007, he testified that difference had grown to \$250 million.²⁸¹ While the difference has grown, it is hardly the "drastic growth" that might justify an isolated change to the depreciation rates for just five accounts.

Public Counsel's witness attempts to justify his proposed isolated adjustment by claiming the balancing of possibly increasing and decreasing rates that would take place in a complete depreciation study is not necessary because if his adjustment were applied to all accounts, not just the five he proposes to adjust, the

²⁷⁷ Dunkel Direct, Ex. 400, Page 6, Lines 1-33, quoting *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 94.

²⁷⁸ Dunkel Direct, Ex. 400, Page 3, Lines 7-20.

²⁷⁹ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Pages 87-88.

²⁸⁰ Dunkel Direct, Ex. 400, Page 8, Lines 17-19.

²⁸¹ Dunkel Direct, Ex. 400, Page 8, Lines 19-24, as corrected at Transcript, Page 824.

result would be a much larger reduction.²⁸² However, his calculation are based on 2005 data, which likely would not be accurate for 2008.²⁸³ Furthermore, his proposed adjustment would still be based on just a single factor, albeit spread over a wider range of accounts. It would not eliminate the single-issue ratemaking objection to his proposal to adjust the depreciation rates for a few accounts outside of a complete depreciation study.

When the Commission last looked at this issue in the 2007 rate case, it accepted Staff's suggestion to continue to monitor the imbalance between theoretical reserve and actual book accumulated depreciation. The Commission will continue to monitor that imbalance and if Public Counsel wants to raise this issue again in AmerenUE's next rate case in the context of a complete depreciation study, it is free to do so.

In his surrebuttal testimony, Dunkel requested that if the Commission decided not to make his proposed adjustments in this case, it should order AmerenUE to include certain information in its next depreciation study to aid in the review of the imbalance.²⁸⁴ That request is reasonable and was not opposed by any party. The Commission will order AmerenUE to include the requested information in its next depreciation study.

Conclusions of Law:

Commission Rule 4 CSR 240-3.160 requires any electric utility that submits a general rate increase to submit a complete depreciation study, unless the utility has previously submitted such a study to the Commission's Staff within the three years before filing the rate case.

Commission Rule 4 CSR 240-3.175 requires an electric utility to submit a complete depreciation study at least once every five years even if it has not filed a rate case within that time.

Decision:

The Commission will not make any changes to AmerenUE's depreciation rates without consideration of a complete depreciation study. When it prepares its next depreciation study, AmerenUE shall provide for each account (1) the book reserve amount, (2) the theoretical reserve amount, (3) the remaining life years, and (4) the whole life

²⁸² Dunkel Surrebuttal, Ex. 401, Page 6, Lines 10-11.

²⁸³ Transcript, Page 894, Lines 6-9.

²⁸⁴ Dunkel Surrebuttal, Ex. 401, Pages 10-11, Lines 16-20, 1-4.

depreciation rate with the reserve variance amortized over the average remaining life.

12. Demand Side Management

Introduction:

In AmerenUE's last rate case, the Commission approved a stipulation and agreement that established a regulatory asset that allows AmerenUE to treat demand side management expenditures as a depreciable asset, thus diminishing any advantage AmerenUE might perceive in investing in new generation rather than in demand-side resources.²⁸⁵ Staff asked the Commission to clarify its previous order by directing that net expenditures were to be included in the regulatory asset account, so that income resulting from demand-side expenditures would be netted against those expenditures.²⁸⁶ In his rebuttal testimony, Public Counsel's witness, Ryan Kind proposed language to accomplish that netting.²⁸⁷ AmerenUE did not object to the concept of netting, but objected to Kind's language as overly broad.²⁸⁸

Findings of Fact:

At the hearing, Kind acknowledged his original language could be difficult to administer. As a result, he offered the following substitute language:

In addition to booking the incremental costs of implementing DSM programs in its regulatory asset account, UE shall book the reimbursement of incremental costs, in dollars, that are equal to capacity related revenues from any source that the Company receives that are associated with its implementation of DSM programs and not otherwise credited.²⁸⁹

At the time of the hearing, Voytas expressed general satisfaction with the change offered by Kind, but indicated he would have to examine the language in more detail before he could accept it.²⁹⁰ In its brief, AmerenUE offered the following language as a substitute for that offered by Kind:

²⁸⁵ Staff Report – Cost of Service, Ex. 200, Page 9.

²⁸⁶ Staff Report – Cost of Service, Ex. 200, Page 9.

²⁸⁷ Kind Rebuttal, Ex. 404, Page 14, Lines 21-25.

²⁸⁸ Voytas Surrebuttal, Ex. 18, Page 4, Lines 8-14.

²⁸⁹ Transcript, Page 929, Lines 3-9.

²⁹⁰ Transcript, Page 948, Lines 15-19.

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DSM should be booked as net expenditures when DSM has a transactionable, identifiable and measurable increase in revenue to the Company. Transactionable refers to tradable products with an identifiable counterparty which provides a value. Identifiable refers to the linkage whereby specific revenue streams can be tied to specific programs. Measurable means that there is a protocol established as the basis for cash settlement.

It appears this issue is moot since the Commission allows AmerenUE to implement a fuel adjustment clause. The netting that would be the result of the language proposed by both AmerenUE and Public Counsel would occur through the fuel adjustment clause.²⁹¹ However, to the extent this issue is not moot, the Commission finds that the language proposed by AmerenUE is preferable because it is more narrowly tailored to meet the need identified by the parties.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The Commission finds that if this issue is not moot, the language proposed by AmerenUE shall be adopted.

13. Low-Income Weatherization Program

Introduction:

In the Commission's Report and Order resolving AmerenUE's last rate case, ER-2007-0002, the Commission ordered AmerenUE to fund a low-income weatherization program. That order directed \$600,000 of that funding be included in AmerenUE's cost of service to be collected from ratepayers. The Commission directed the other \$600,000 be paid by AmerenUE using shareholder funds.²⁹² In response to the 2007 order, AmerenUE entered into a contract with the Missouri Department of Natural Resources, the State Environmental Improvement and Energy Resources Authority (EIERA), and the Public Service Commission, whereby it agreed to pay \$1,200,000 to the low-income weatherization

²⁹¹ Transcript, Page 942, Lines 8-25.

²⁹² *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Pages 112-113.

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fund administered by EIARA on July 5 of each year.²⁹³ AmerenUE made the entire required payment in 2007, but on June 26, 2008, it paid only \$900,000 to the fund.

The Department of Natural Resources asks the Commission to order AmerenUE to pay the \$300,000 it withheld in July, and asks the Commission to order AmerenUE to continue funding the program in the future.

Findings of Fact:

At the hearing, the parties agreed there was no dispute about the facts and agreed this issue could be resolved on stipulated facts and as a matter of law. To that end, they agreed to stipulate to the following three facts:

1. In the Commission's Report and Order issued in ER-2007-0002, the Commission ordered that: "the Commission directs that the low income weatherization program continue with funding provided \$600,000 by ratepayers and \$600,000 by AmerenUE shareholders."
2. A contract was entered into among the parties and a true and correct copy of that contract is attached to the direct testimony of DNR witness Wolfe, marked as Exhibit LW-2.
3. AmerenUE paid \$900,000 on or around June 26, 2008, toward that obligation.²⁹⁴

The parties also agreed the prefiled testimony of all witnesses relating to this issue could be admitted into evidence without cross-examination.²⁹⁵

AmerenUE withheld \$300,000 from the July 2008 payment required by the contract because it believed new rates would be going into effect on March 1, 2009 at the conclusion of this case and it was unsure whether this Commission would require it to continue to make the payment under the new rates. Therefore, it withheld payment for the last three months of the fiscal year.²⁹⁶

As explained in its conclusions of law, the Commission has no authority to require AmerenUE's shareholders to make what is in essence a charitable contribution to the low-income weatherization fund.

²⁹³ A copy of that contract is attached to Wolfe Direct, Ex. 550, as Attachment LW-2.

²⁹⁴ Transcript, Page 1001, Lines 9-23.

²⁹⁵ Transcript, Page 1002, Lines 5-9.

²⁹⁶ Wolfe Direct, Ex. 550, Page 12-18.

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Therefore, it cannot require AmerenUE's shareholders to continue to contribute \$600,000 to the fund. However, there is a continuing need for the low-income weatherization fund. The Commission finds that low-income residential customers face great hardships as they face high energy expenses on a small household income. Weatherization provides long-term benefits to customers by helping reduce energy demand, thereby reducing energy bills.²⁹⁷ Therefore, the Commission will order AmerenUE to continue to pay \$1.2 million per year into the fund, with all funds being recovered through rates. Since the program is continuing at full funding, AmerenUE shall immediately pay into the fund the \$300,000 it withheld in June 2008.

There is one other matter that needs to be addressed. The Department of Natural Resources is concerned about disruptions in payment to the EIERA fund every time AmerenUE files a new rate case and thus brings the continued funding of the program into question. AmerenUE concedes the EIERA needs to have a stable source of funding, but is unwilling to commit to making payments that it may not recover in a future rate case.²⁹⁸ AmerenUE may have an obligation to make those payments under its contract with EIERA, the Department of Natural Resources, and this Commission. However, as indicated in the conclusions of law for this issue, the Commission has no authority to enforce that contract. The Commission, will, however, encourage AmerenUE to continue its stable funding of the program. While this Commission cannot bind a future Commission to make a particular decision in a future rate case, the Commission believes that AmerenUE will be treated fairly in any future rate case.

Conclusions of Law:

The Commission has broad authority under the law to regulate public utilities. It does not, however, have unlimited power. The case cited by AmerenUE, *City of Joplin v. Wheeler*,²⁹⁹ although an old case, actually predating the creation of this Commission, establishes the principle that a regulatory body "can no more compel a public service corporation to do or abstain from doing anything not pertaining to the public service itself than it can compel a private individual; for, outside of its public functions, the corporation is a private corporation."³⁰⁰ By ordering

²⁹⁷ Wolfe Direct, Ex. 550, Page 6, Lines 4-9.

²⁹⁸ Mark Rebuttal, Ex. 20, Pages 7-8, Lines 18-23, 1-7.

²⁹⁹ 173 Mo. App. 590, 158 S.W. 924 (Mo. App. 1913).

³⁰⁰ *City of Joplin*, at 928.

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AmerenUE to fund part of the low-income weatherization program the Commission would be requiring the shareholders to make a charitable contribution. Such a contribution has nothing to do with AmerenUE's obligation to provide service to the public and is beyond the Commission's authority.

AmerenUE has entered into a contract that requires the company to pay \$1.2 million each July to EIARA. AmerenUE did not make the full required payment in July 2008. In refusing to make that payment, AmerenUE may have violated that contract, but the Commission has no authority to make such a determination. "The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto."³⁰¹ The Commission is not a court, and the legislature has not given it authority to enforce a contract.³⁰² Therefore, if any party want to enforce that contract, it will need to proceed to circuit court.

Decision:

The Commission finds that AmerenUE shall continue to pay \$1.2 million per year into the low-income weatherization fund administered by EIARA. AmerenUE's payments to the fund shall be included in the company's revenue requirement to be recovered through rates.

14. Pure Power Program

Introduction:

In AmerenUE's last rate case, the Commission approved AmerenUE's proposal to begin offering a voluntary green energy program.³⁰³ The voluntary program AmerenUE now offers is called Pure Power. Staff opposed the proposed green energy program in the last rate case and now asks the Commission to require AmerenUE to discontinue the program.

Findings of Fact.

The Pure Power program is a voluntary program whereby participating AmerenUE customers agree to pay an additional amount on their monthly bill to purchase a Renewable Energy Credit, known as a

³⁰¹ *State ex rel. AG Processing v. Thompson*, 100 S.W. 3d 915, 919 (Mo. App. W.D. 2003).

³⁰² *Kansas City Power & Light v. Midland Realty*, 338 Mo 1141, 93 S.W.2d 954 (Mo. 1936).

³⁰³ *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 115.

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REC. The RECs are purchased from a third party, 3 Degrees, which purchases the RECs from the green power producer.³⁰⁴

AmerenUE has entered into a five-year contract with 3 Degrees that fixes the price AmerenUE customers pay for a REC at fifteen dollars.³⁰⁵ One dollar of that fifteen is kept by AmerenUE as an administrative fee, with the remaining fourteen going to 3 Degrees. 3 Degrees uses that money to buy the REC and keeps any money left over to pay its own expenses, and as profit.

3 Degrees is obligated under the contract to market and administer the Pure Power program and to educate AmerenUE's customers about the program.³⁰⁶ One half of the RECs 3 Degrees purchases for AmerenUE's customers must come from green power generators located in Missouri or Illinois, with the rest coming from generators located within the MISO region.³⁰⁷ The Pure Power program is Green-e certified and 3 Degrees pays for an annual Green-e audit through the Center for Resource Solutions.³⁰⁸

The Pure Power program has been operating since October 2007.³⁰⁹ Approximately 4000 AmerenUE customers have chosen to participate in the program during that first year.³¹⁰

Staff is concerned the sale of RECs is not an effective means of producing green power to supplant fossil fuel power. RECs are for the purchase of power generated in the past, and Staff is concerned the sale of RECs will do nothing to encourage the future generation of green power.³¹¹ This is the same concern Staff expressed in the last rate case. However, other governmental organizations do not share Staff's concern. The National Renewable Energy Lab and the Federal Department of Energy state programs such as Pure Power have assisted in bringing more than 1,000 MWs of new renewable projects online.³¹²

A REC is not produced until actual renewable energy is produced. Even though those electrons have already been produced and used, the sale and purchase of a REC stimulates demand for additional renewable energy by sending a market signal to green power

³⁰⁴ Barbieri Rebuttal, Ex. 9, Page 3, Lines 8-14.

³⁰⁵ Barbieri Rebuttal, Ex. 9, Page 4, Lines 9-10.

³⁰⁶ Barbieri Rebuttal, Ex. 9, Page 4, Lines 11-13.

³⁰⁷ Barbieri Rebuttal, Ex. 9, Page 4, Lines 15-20.

³⁰⁸ Barbieri Rebuttal, Ex. 9, Page 4, Lines 21-23.

³⁰⁹ Transcript, Page 662, Lines 12-17.

³¹⁰ Transcript, Page 713, Lines 7-10.

³¹¹ Staff Report – Class Cost of Service & Rate Design, Ex. 206, Page 19-20.

³¹² Barbieri Rebuttal, Ex. 9, Page 7, Lines 9-11.

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producers to develop additional sources of renewable energy.³¹³ Staff's witness may not believe RECs are effective, but he concedes that millions of RECs are sold each year.³¹⁴ He also concedes the Missouri Department of Natural Resources, and the Environmental Protection Agency support the concept of RECs.³¹⁵ In fact, he concedes RECs are widely accepted throughout the nation as contributing to the expansion of green generation, although he describes that acceptance as "an unsubstantiated belief, widely accepted."³¹⁶

Staff is also concerned that customers are confused about what they are actually receiving when they purchase a REC. Staff seems to believe customers think they are buying actual electrons generated by a green generation source, when they buy a REC. The concept of a REC and the purchase of the environmental attributes associated with green production versus fossil fuel production is difficult to understand.³¹⁷ AmerenUE concedes it is difficult to explain to customers that they are purchasing a REC and not electricity. Some of the initial marketing materials sent out by 3 Degrees did not do enough to avoid that confusion, but AmerenUE and 3 Degrees have continued to improve those marketing materials, including major revisions to the Pure Power website. In the end, the desire to improve the marketing materials does not justify terminating the program after only one year of existence.

Aside from its concerns about the effectiveness and the marketing of the Pure Power program, Staff is also concerned the contract between AmerenUE and 3 Degrees does not pass enough money through to actual green energy producers. As previously indicated fourteen of the fifteen dollars AmerenUE collects from participating customers is passed to 3 Degrees for the purchase of RECs. Not surprisingly, not all the money that goes to 3 Degrees is used to purchase RECs. 3 Degrees keeps some to pay for marketing and administration and profit.³¹⁸ Staff believes the contract is overly generous to 3 Degrees. However, 3 Degrees assumed the risk that the market price for RECs may rise in the next five years, thus reducing its profit margin. A rise in the market price for RECs is possible as demand for RECs rises because of the imposition of

³¹³ Transcript, Page 724, Lines 14-21.

³¹⁴ Transcript, Page 629, Lines 16-22.

³¹⁵ Transcript, Page 637, Lines 13-18.

³¹⁶ Transcript, Pages 641-642, Lines 22-25, 1-4.

³¹⁷ Transcript, Page 628, Lines 6-14.

³¹⁸ The highly confidential numbers are found at Ensrud Surrebuttal, Ex. 220, Page 11, Line 18.

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renewable portfolio standards such as the recently enacted Proposition C in Missouri.³¹⁹

Finally, Staff is concerned non-participating AmerenUE customers may be subsidizing AmerenUE's administrative costs associated with the Pure Power program because AmerenUE is not doing enough to separately track those costs.³²⁰ AmerenUE agrees that non-participating customers should not be subsidizing the program and indicates all administrative costs, as well as revenues generated by the

program, are accounted for below the line.³²¹ Staff is concerned, for example, that the cost of billing customers who participate in the Pure Power program is not segregated from the cost of billing all other customers.³²² However, the maximum potential cost identified by Staff is not substantial and does not justify any immediate accounting change.³²³

The Commission finds that the Pure Power program is a voluntary program that seems to be popular with some of AmerenUE's customers. No customer is forced to participate in the program and if they are unhappy with the program, they can leave at any time. The program is nationally respected and has been awarded the 2008 New Green Power Program of the year award by the U.S. Department of Energy, in conjunction with the U.S. Environmental Protection Agency and the Center for Resource Solutions.³²⁴ Most importantly, the program has only been in operation for one year. It is too soon to properly assess the program and it is certainly too soon to kill the program.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The Commission authorizes AmerenUE to continue to offer the voluntary Pure Power program to its customers.

³¹⁹ Transcript, Page 748, Lines 11-19.

³²⁰ Staff Report – Class Cost of Service & Rate Design, Ex. 206, Pages 21-22.

³²¹ Barbieri Rebuttal, Ex. 9, Page 9, Lines 5-22.

³²² Transcript, Page 696, Lines 4-10.

³²³ Staff Report – Class Cost of Service & Rate Design, Ex. 206, Page 22. The precise number is highly confidential.

³²⁴ Barbieri Rebuttal, Ex. 9, Page 11, Lines 1-5, and Transcript, Page 703-704, Lines 20-25, 1.

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15. Union Issues

Introduction:

The various unions that represent AmerenUE's employees appeared at the hearing to generally support the company's request for a rate increase. However, they asked the Commission to order AmerenUE to spend more money on employee training and to take specific steps to increase its internal workforce so it will use fewer outside contractors. AmerenUE contends it is currently providing safe and adequate service and argues the Commission has no authority to manage the day-to-day affairs of the company.

Findings of Fact:

David Desmond is the business manager of International Brotherhood of Electrical Workers Local 2, AFL-CIO.³²⁵ He testified that too much of AmerenUE's daily workload is performed by less trained subcontractors rather than by AmerenUE's internal workforce.³²⁶ He asked the Commission to require AmerenUE to invest in its employee infrastructure and require subcontractors to meet the standards of training and certification similar to those required of AmerenUE's internal workforce.³²⁷

Donald Giljum is the Business Manager for the International Union of Operating Engineers Local Union No. 148.³²⁸ He testified AmerenUE has curtailed its training activities and allowed internal staffing level to decline to the point it must rely on outside contractors to perform some of the work at its power plants.³²⁹

Michael Walter is the Business Manager of International Brotherhood of Electrical Workers Local 1439, AFL-CIO.³³⁰ He testified AmerenUE has not spent enough on training new workers and as a result has over-relied on outside contractors to perform normal and sustained work.³³¹ He asks the Commission to require AmerenUE to spend its rate increase to improve training and increase the portion of the workload performed by its internal workforce.³³²

³²⁵ Desmond Direct, Ex. 901, Page 1, Lines 2-3.

³²⁶ Desmond Direct, Ex. 901, Page 2, Lines 14-22.

³²⁷ Desmond Direct, Ex. 901, Page 3, Lines 13-19.

³²⁸ Giljum Direct, Ex. 903, Page 1.

³²⁹ Giljum Direct, Ex. 903, Page 2.

³³⁰ Walter Direct, Ex. 902, Page 1, Lines 2-3.

³³¹ Walter Direct, Ex. 902, Pages 2-4.

³³² Walter Direct, Ex. 902, Page 6, Lines 8-23.

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Michael Datillo is the Business Manager and Financial Secretary of International Brotherhood of Electrical Workers Local 1455, AFL-CIO.³³³ Datillo also complained AmerenUE relied too heavily on outside contractors. In particular, he objected to the outsourcing of call center work to a company operating out of North Carolina.³³⁴

AmerenUE denied its use of outside contractors has diminished the efficiency or safety of the company's operations. AmerenUE demonstrated that measures of power plant reliability have significantly improved over the last 10 years. Since 1998, the equivalent availability³³⁵ of AmerenUE's coal plants has improved from 79.91 percent in 1998, to 90.73 percent in 2008. In the same period of time, the net capacity factor³³⁶ for those plants has improved from 61.92 percent to 79.26 percent.³³⁷ Furthermore, the OSHA incident rate for generation employees has declined over the last ten years from 9.0 in 1998 to 1.9 in 2008,³³⁸ which is near the top quartile rate for generating plants around the country.³³⁹

AmerenUE acknowledges it is facing an industry-wide shortage of trained linemen, and must, therefore, rely on outside contractor. However, AmerenUE is trying to find more workers that are qualified and is offering a \$15,000 bonus for persons who qualify as a journeyman lineman.³⁴⁰ In addition to a general shortage of linemen, the average age of AmerenUE's work force is getting older. For example, in one union bargaining unit the average age is 49 and one half, with an average retirement age of 55 or 56.³⁴¹ As more employees approach retirement, there is a need for increased training to bring new workers in to replace those who are retiring.

In response to those concerns, Commissioner Davis asked the AmerenUE witnesses how the company would spend an extra \$3 million on training if provided with additional funds as a result of this case.³⁴² In

³³³ Datillo Direct, Ex. 900, Page 1, Lines 2-4.

³³⁴ Datillo Direct, Ex. 900, Page 2, Lines 18-20.

³³⁵ Equivalent availability is the total actual megawatt hours a unit is available after all outages and derates have been subtracted, divided by the total maximum megawatt hours a full unit capacity. Birk Rebuttal, Ex. 15, Pages 6-7, Lines 22-23, 1.

³³⁶ Net capacity factor is a ratio of how much power was actually produced by the plants, divided by the capacity of the plants. Birk Rebuttal, Ex. 15, Page 7, Lines 2-3.

³³⁷ Birk Rebuttal, Ex 15, Page 7, Chart at Line 4.

³³⁸ Birk Rebuttal, Ex. 15, Page 8, Chart at Line 1.

³³⁹ Transcript, Page 1810, Lines 22-25.

³⁴⁰ Zdellar Rebuttal, Ex. 16, Page 11, Lines 12-13.

³⁴¹ Transcript, Page 1766, Lines 17-25.

³⁴² Transcript, Page 1820-1821, Lines 23-25, 1-19.

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response to Commissioner Davis' question, AmerenUE subsequently filed an exhibit detailing how it would spend extra money on training.³⁴³

The Commission finds that the evidence presented by the union witnesses does not demonstrate that AmerenUE has failed to supply safe and adequate service to the public. Furthermore, for reasons fully explained in its Conclusions of Law, the Commission does not have the authority to dictate the manner in which AmerenUE conducts its business. Therefore, the Commission will not attempt to dictate to the company regarding its use of outside contractors.

However, the union witnesses and AmerenUE agree there is a need for improved training to replace skilled workers nearing retirement age. Therefore, the Commission will add \$1,410,000 to AmerenUE's cost of service to fund increased training staff. The Commission will also allow AmerenUE an additional \$1,800,000 for additional training equipment and materials, and external costs, to be amortized over five years and recovered in rates. That would increase AmerenUE's cost of service by an additional \$360,000 per year, for a total increase of \$1,770,000.

Conclusions of Law:

The Commission has the authority to regulate AmerenUE, including the authority to ensure the utility provides safe and adequate service. However, the Commission does not have authority to manage the company. In the words of the Missouri Court of Appeals,

The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare.³⁴⁴

Therefore, the Commission does not have the authority to dictate to the company whether it must use its internal workforce rather than outside contractors to perform the work of the company.

³⁴³ Ex. 78.

³⁴⁴ *State ex rel. Harline v. Public Serv. Com'n*, 343 S.W.2d 177, 182 (Mo. App. 1960)

Decision:

The evidence presented by the union witnesses does not demonstrate that AmerenUE has failed to provide safe and adequate service and the Commission will not dictate to the company whether it must use its internal workforce or outside contractors to perform the company's work. However, the Commission will add \$1,410,000 to AmerenUE's cost of service to fund increased training staff. The Commission will also allow AmerenUE an additional \$1,800,000 for additional training equipment and materials, and external costs, to be amortized over five years and recovered in rates. That increases AmerenUE's cost of service in this case by \$1,770,000 per year.

16. Hot Weather Safety Program**Introduction:**

AARP asks the Commission to order AmerenUE to instigate a limited experimental pilot program designed to encourage low-income seniors to turn on their air conditioners during hot weather by offering them a bill credit during the summer. AmerenUE opposes the pilot program as poorly thought out and unlikely to be effective.

Findings of Fact:

AARP cites studies showing that some seniors refuse to turn on their air conditioners even in very hot weather, in part because of concerns about the high cost of operating an air conditioner.³⁴⁵ As a result, those seniors are at a greater risk of dying from heat related illness.³⁴⁶ AARP's proposed pilot program attempts to address that problem by offering low-income seniors a small bill credit on their bills to encourage them to use their air conditioning when it is hot.

AARP initially proposed to make the hot weather credit available to all low-income seniors in the AmerenUE's service territory at a cost of nearly \$1.5 million.³⁴⁷ However, by the time of the hearing, AARP had reduced its proposal to an experimental pilot program that would provide bill credits of \$5 per day for 9.5 extreme heat days during the summer months, for 2,400 participating households. The cost of providing the bill credits would be \$114,000, which AmerenUE would be allowed to recover in rates.³⁴⁸

³⁴⁵ Howat Direct, Ex. 850, Pages 6-7, Lines 17-23, 1-5.

³⁴⁶ Howat Direct, Ex. 850, Page 8, Lines 1-20.

³⁴⁷ Howat Direct, Ex. 850, Page 12, Lines 7-8.

³⁴⁸ Transcript, Page 1130, Lines 7-12.

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The Commission is concerned about the health of the elderly citizens of AmerenUE's service territory, but AARP's proposed pilot program is not well thought out and there is no indication that a bill credit of \$5.00 per day will actually prompt an at-risk elderly person to turn on their air conditioning. This sort of program has never been tried anywhere else and AARP admits it does not really know how it will work.³⁴⁹ A heat alert warning from the Missouri Department of Health, attached to AARP's testimony, indicates for some at-risk elderly persons, "even encouragement from relatives and friends could not convince them to use their air conditioner."³⁵⁰ In those circumstances, it is hard to see how a slightly reduced utility bill at the end of the month would convince an at-risk person to turn on their air conditioning.

Of course, in terms of this multi-million dollar rate case, the \$114,000 it would cost to implement AARP's pilot program is not significant. However, implementation of an ill-conceived pilot program could distract AmerenUE and other interested parties from more effective actions to help the elderly poor. In fact, that was the conclusion of the collaborative group to which AARP presented its proposal last spring.³⁵¹ Instead, that collaborative group decided to move forward with other plans to educate the elderly about the dangers of extreme heat.³⁵²

The Commission finds that AARP's proposed hot weather safety pilot program, while well intentioned, would not be an effective use of AmerenUE's resources and the financial resources of AmerenUE's ratepayers.

Conclusions of Law:

There are no additional conclusions of law on this issue.

Decision:

AARP's proposed hot weather safety pilot program is rejected.

³⁴⁹ Transcript, Pages 1165-1166, Lines 20-25, 1-2.

³⁵⁰ Howat Direct, Ex. 850, Attachment AARP-JH-3.

³⁵¹ Transcript, Page 1228, Lines 8-14.

³⁵² Transcript, Page 1231, Lines 5-9.

17. Certain Power On and Dollar More Advertising Expense

Introduction:

Staff seeks to disallow approximately \$1.36 million in advertising expenses incurred by AmerenUE in promoting its Power On program and its Dollar More program.³⁵³

AmerenUE replied that the advertisements challenged by Staff were appropriate for inclusion in rates and their cost should be recovered from ratepayers.

Findings of Fact:

Staff bases its proposal to disallow the cost of certain advertisements on a decision made by the Commission in a 1986 KCPL rate case. In that decision, the Commission defined five categories of advertisements.

1. General: Informational advertising that is useful in the provision of adequate service;
2. Safety: Advertising that conveys the ways to safely use electricity and to avoid accidents;
3. Promotional: Advertising used to encourage or promote the use of electricity;
4. Institutional: Advertising used to improve the company's public image; and
5. Political: Advertising associated with political issues.

In that case, the Commission found the cost of General and Safety advertising could be recovered from ratepayers, while the cost of Institutional and Political advertising should not be recovered. The Commission in that case found promotional advertising could be recovered if it was shown to be cost justified.³⁵⁴ The Commission finds that categorization of advertising to be useful and will use the same categories in considering this issue.

Staff's witness, Erin Carle, examined hundreds of individual print, radio, television and billboard advertisements, the cost of which AmerenUE seeks to recover in rates. Staff disallowed recovery for many of those advertisements as institutional advertising designed to promote the

³⁵³ Transcript, Page 1008, Lines 10-12.

³⁵⁴ *In the Matter of Kansas City Power & Light Company's Tariffs Increasing Rates for Electric Service*, 28 Mo. P.S.C. (N.S.) 228, 270 (1986).

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image of the utility.³⁵⁵ AmerenUE contend the challenged ads are properly categorized as General, meaning they are informational advertising that is useful in the provisioning of adequate service.

AmerenUE's Power On program is a billion dollar initiative AmerenUE has undertaken to improve the reliability of its electric network. Under Power On, AmerenUE will spend approximately \$500 million in mandated environmental expenditures, \$300 million in undergrounding work, and \$150 million to more aggressively trim trees.³⁵⁶ Staff conceded that some advertising for Power On should be categorized as General advertising because it conveyed useful information to the public about the specifics of the program. However, Staff claimed the cost of other Power On ads should be excluded because the advertisements did not convey enough useful information to the public.³⁵⁷

Erin Carle examined each of AmerenUE's Power On advertisements and offered an opinion on whether each advertisement conveyed enough useful information to the public. The problem with that approach is Erin Carle is an accountant, and is working on her MBA.³⁵⁸ Although she claims to be an advertising expert for ratemaking purposes,³⁵⁹ she has no training in the field of advertising, aside from looking at old cases at the Commission.³⁶⁰

Not surprisingly, given her lack of expertise and the vague standard by which she was attempting to judge the individual advertisements, Carle's testimony fell apart on cross-examination and it became clear that her categorization of particular Power On advertisements as either General and thus recoverable, or Institutional, and thus excludable, was essentially arbitrary.

The fault was not with Ms. Carle, but rather with Staff's attempt to individually categorize each and every advertisement produced by AmerenUE. As Mr. Mark testified for AmerenUE, it makes more sense to look at an advertising campaign as a whole.³⁶¹ Thus, a simple billboard advertisement that by its nature cannot convey a great deal of information to a motorist rushing by at 70 miles per hour, may motivate

³⁵⁵ Carle Surrebuttal, Ex. 219, Page 7, Lines 16-19.

³⁵⁶ Mark Rebuttal, Ex. 20, Page 6, Lines 7-10.

³⁵⁷ Transcript, Page 1040, Lines 17-20.

³⁵⁸ Transcript, Page 1030, Lines 12-20.

³⁵⁹ Transcript, Page 1038, Lines 19-25.

³⁶⁰ Transcript, Page 1039, Lines 6-16.

³⁶¹ Transcript, Page 1024, Lines 7-11.

and direct that customer to seek out more detailed information from another source.

In the future, Staff would do well to examine advertisements on a campaign basis rather than becoming ensnared in the effort to evaluate individual ads within a larger campaign. If on balance a campaign is acceptable then the cost of individual advertisements within that campaign should be recoverable in rates. If the campaign as a whole is unacceptable under the Commission's standards, then the cost of all advertisements within that larger campaign should be disallowed.

The same finding must be made in relation to the challenged Dollar More advertisement, which was a print advertisement that appeared in the game day program for the St. Louis Rams and urged Rams fans to go to the company website to learn more about the Dollar More program.³⁶² The overall campaign to promote the Dollar More program is acceptable, so the individual advertisements within that larger campaign shall not be disallowed.

For purposes of this case, Staff's proposal to disallow the cost of certain Power On and Dollar More advertisements is rejected.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Staff's proposal to disallow the cost of certain Power On and Dollar More advertisements is rejected.

18. Rate Design

Introduction:

After the Commission determines the amount of rate increase that is necessary, it must decide how that rate increase will be spread among AmerenUE's customer classes. The basic principle guiding that decision is that the customer class causing a cost should pay that cost. During the course of the hearing, Public Counsel, MIEC, MEG, the Commercial Group, and Noranda filed a nonunanimous stipulation and agreement that reached an agreement on how the rate increase should be allocated to the customer classes. AmerenUE did not sign the stipulation and agreement but did not oppose the compromise

³⁶² The ads in question are attached to Mark Rebuttal, Ex. 20, Schedules RJM-RE2-9 and RE2-10.

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agreement. Staff, however, does oppose that agreement. Therefore, the Commission cannot approve the stipulation and agreement. Nevertheless, the compromise described in the stipulation and agreement remains the position of the signatory parties and the Commission can consider that position as it decides this issue.

Findings of Fact:

AmerenUE has five customer classes.³⁶³ The Residential class is comprised of residential households. The Small General Service and Large General Service classes are comprised of commercial operations of various sizes. The first three classes receive electric service at a low secondary voltage level. The Small Primary Service and the Large Primary Service are larger industrial operations that receive their electric service at a high voltage level. The final class is Large Transmission Service. There is only one member of that class, Noranda. Noranda operates an aluminum smelter in Southeast Missouri and receives massive amounts of electricity at a transmission voltage level.³⁶⁴

To evaluate how best to allocate costs among these customer classes, four parties prepared and presented class cost of service studies. The studies presented by AmerenUE and MIEC used versions of the Average and Excess Demand Allocation method. An Average and Excess Demand Allocation method recognizes that peak demand, the amount of energy that must be produced and delivered during the periods of highest demand, and average class energy consumption, determine how the generation and distribution systems must be structured. The Average and Excess Demand Allocation method gives weight to both of those considerations by evaluating both average class demands and the excess non-coincident peak demands of each class.³⁶⁵

Staff and Public Counsel also presented class cost of service studies, but they used a different allocation method known as a Peak and Average Demand Allocation method. Staff's allocation method is based on each class' contribution to the 12 monthly non-coincident class peak demands and applies a monthly weighting factor for capacity

³⁶³ The Lighting class, which includes street lights, is a sixth class but because of its unique load pattern, it is not treated as a separate class for the class cost of service studies. Staff Report - Class Cost of Service & Rate Design, Ex. 206, Page 9.

³⁶⁴ Cooper, Direct, Ex. 39, Page 4, Lines 7-11.

³⁶⁵ Cooper Direct, Ex. 39, Page 13, Lines 7-21.

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utilization prior to calculating the class contribution to demand.³⁶⁶ Public Counsel also presented a second study using a time of use method.

The following chart compares the results of each of the class cost of service studies, indicating the percent change in class revenues required to equalize class rates of return. A negative number means the class is paying more than its indicated share of costs. A positive number means that class is paying less than its indicated share.

Study	Residential	Small General Service	Large General Service	Primary Service	Large Transmission Service
Staff	3.160%	-3.063%	-5.092%	2.901%	4.882%
AmerenUE	6.820%	-6.626%	-7.561%	3.536%	-2.641%
OPC (TOU)	-1.850%	-9.900%	-2.130%	14.470%	23.010%
OPC (A&P)	0.060%	-7.080%	-2.550%	10.480%	11.630%
MIEC	12.300%	-5.800%	-11.000%	-3.800%	-16.200%

The completion of a class cost of service study does not end the rate the design process. The Commission is not required to precisely set rates to match the indicated class cost of service. Instead, the Commission has a great deal of discretion to set just and reasonable rates, and can take into account other factors, such as public acceptance, rate stability and revenue stability in setting rates.³⁶⁷

AmerenUE and Staff proposed that because their class cost of service studies did not show any large variations from appropriate class contributions, any rate increase should be allotted equally to each customer class. In other words, each class would receive the system average percentage increase. Several other parties advocated various adjustments to benefit the customer classes they represent.

The objected-to stipulation and agreement represents a compromise among the various customer classes. It would divide any rate increase into three tiers, as follows:

Tier 1: For any increase up to \$80 million, all classes will receive the system average percentage increase.

³⁶⁶ Staff Report – Class Cost of Service & Rate Design, Ex. 206, Page 11.

³⁶⁷ Cooper Direct, Ex. 39, Attachment A-2.

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Tier 2: The Tier 2 spread operates on any approved increase equal to or above \$80 million and up to \$150 million. Within Tier 2, there are several interrelated adjustments.

Step 1. The increment directed to the Large Transmission Service class will be one-half of the system average percentage increase.

Step 2. The amount of the increase not directed to the Large Transmission Service class will be spread among the remaining customer classes in proportion to the true-up level of rate revenues of these classes.

Step 3. The residential increase will be adjusted to be equal to the system average percentage increase plus 0.3 percent. For example, a 7 percent system average increase would result in a residential increase of 7.3 percent.

Step 4. The additional revenue generated by the Step 3 adjustment to residential class revenues will be spread among the Small General Services, Large General Services and Small Primary Service rate classes in proportion to the true-up revenues from those rate classes.

Tier 3. Tier 3 applies to the increase amount, if any, in excess of \$150 million. Under that Tier, all classes will receive the system average percentage increase.

In other words, the first \$80 million of rate increase will be spread equally over all classes as Staff and AmerenUE suggested. It is only for the increment between \$80 million and \$150 million that any adjustments would be made among the classes.

At the hearing, after the compromise was filed, witness after witness took the stand to testify that the compromise is supported by the studies and would be a reasonable exercise of the Commission's authority to set reasonable rates. Maurice Brubaker, the witness for MIEC, a collection of large industrial customers, testified that the compromise is consistent with the class cost of services studies. He pointed out that the deviations from system average were minor, with no disruptive increases for any customer class.³⁶⁸ Donald Johnstone testified in support of the compromise on behalf of Noranda, the only member of the

³⁶⁸ Transcript, Page 1916, Lines 1-16.

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Large Transmission Service class.³⁶⁹ Richard Baudino, testifying on behalf of the Commercial Group, a group of large retailers, described the compromise as reasonable and resulting in “just and reasonable rates the Commission can rely on.”³⁷⁰ Finally, Barbara Meisenheimer and Ryan Kind testified on behalf of Public Counsel. Both Meisenheimer³⁷¹ and Kind³⁷² supported the compromise position.

The only witness who opposed the compromise position was James Watkins representing Staff. He indicated Staff opposed the compromise because it would result in a reduction for the Large Transmission Service, which Staff’s study shows is already paying less than its indicated share of costs.³⁷³ Staff acknowledged its study also showed that the Small General Service, Large General Service, and Small Primary Services classes should receive a smaller than system average increase, as they would under the compromise position, but not under the across the board increase demanded by Staff.³⁷⁴ Staff also conceded that only \$2.9 million is being redistributed between classes compared to the equal percentage distribution demanded by Staff.³⁷⁵ That \$2.9 million would represent only 0.14 percent of AmerenUE current total revenues.³⁷⁶ Nevertheless, Staff dogmatically insisted it would oppose the compromise position even if only \$1 was redistributed for the benefit of the Large Transmission Service class.³⁷⁷

Staff claims its position is justified because its cost of service study shows the Large Transmission Service class should be given a larger than system average increase rather than a decrease. The cost of service studies presented by AmerenUE and MIEC both indicate the Large Transmission Service class should receive a lower than average increase, but Staff believes only its cost of service study, and perhaps that of Public Counsel, is valid.³⁷⁸

However, the method Staff uses in its study, the Capacity Utilization method, is a method of Staff’s own invention, having been

³⁶⁹ Transcript, Page 1952-1953, Lines 24-25, 1-7.

³⁷⁰ Transcript, Page 1965, Lines 4-8.

³⁷¹ Transcript, Page 1974, Lines 18-25.

³⁷² Transcript, Pages 1976-1977, Lines 14-25, 1-13.

³⁷³ Transcript, Page 1991, Lines 22-25.

³⁷⁴ Transcript, Page 1995, Lines 10-15.

³⁷⁵ Transcript, Page 2017, Lines 11-14.

³⁷⁶ Transcript, Page 2018, Lines 1-4.

³⁷⁷ Transcript, Page 2015, Lines 6-10.

³⁷⁸ Transcript, Page 2025, Lines 10-17.

designed by Dr. Michael Proctor in 1982.³⁷⁹ Staff has used this method since that time, but the method has never been accepted by this or any other Commission in the country.³⁸⁰ Indeed, the Peak and Average Demand allocation method used by Staff is inherently flawed as it double counts the average demand of customer classes, resulting in customers with higher load factor, in other words industrials, being allocated an inequitable share of production plant investment.³⁸¹

The Commission finds that the compromise position advocated by parties representing all of the customer classes is supported by the class cost of service studies submitted by AmerenUE and MIEC. The class cost of service study offered by Staff is inherently flawed and unreliable, but even that study does not preclude the slight redistribution between classes that will result from the compromise position. The Commission find that the compromise position will result in just and reasonable rates, and the Commission will adopt that position.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The Commission adopts the compromise position advocated by Public Counsel, MIEC, MEG, the Commercial Group, and Noranda. That position is described as follows:

Tier 1: For any increase up to \$80 million, all classes will receive the system average percentage increase.

Tier 2: The Tier 2 spread operates on any approved increase equal to or above \$80 million and up to \$150 million. Within Tier 2, there are several interrelated adjustments.

Step 1. The increment directed to the Large Transmission Service class will be one-half of the system average percentage increase.

Step 2. The amount of the increase not directed to the Large Transmission Service class will be spread among the remaining customer classes in proportion to the true-up level of rate revenues of these classes.

Step 3. The residential increase will be adjusted to be equal to the system average percentage increase plus

³⁷⁹ Staff Report – Class Cost of Service & Rate Design, Ex. 206, Page 12.

³⁸⁰ Transcript, Page 2066, Lines 15-18.

³⁸¹ Cooper Rebuttal, Ex. 40, Pages, 4-5, Lines 17-23, 1-4.

0.3 percent. For example, a 7 percent system average increase would result in a residential increase of 7.3 percent.

Step 4. The additional revenue generated by the Step 3 adjustment to residential class revenues will be spread among the Small General Services, Large General Services and Small Primary Service rate classes in proportion to the true-up revenues from those rate classes.

Tier 3. Tier 3 applies to the increase amount, if any, in excess of \$150 million. Under that Tier, all classes will receive the system average percentage increase.

19. FERC 7-Factor Test

Introduction:

This final issue is not contested by any party. Nonetheless, AmerenUE asks the Commission to make a factual determination to satisfy the requirements of its agreement with the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), and Midwest ISO's FERC electric tariff.

Findings of Fact:

The Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation requires its member utilities to request a determination by their state regulatory commission that the utility has classified its energy delivery facilities in accordance with the 7-Factor Test prescribed by the Federal Energy Regulatory Commission (FERC).³⁸² AmerenUE is a party to that agreement by virtue of its membership in the Midwest ISO.

The FERC 7-Factor Test is a test used to determine whether an energy delivery facility should be classified as either local distribution or transmission.³⁸³ As a participant in the Midwest ISO, AmerenUE has

³⁸² Pfeiffer Direct, Ex. 53, Page 2, Lines 15-14.

³⁸³ The 7 factors in FERC's test are as follows:

1. Local distribution facilities are normally in close proximity to retail customers.
2. Local distribution facilities are primarily radial in character.
3. Power flows into local distribution systems; it rarely, if ever, flows out.
4. When power enters a local distribution system, it is not reconsigned or transported on to some other market.

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transferred operational control of its electrical transmission facilities to the Midwest ISO. AmerenUE retains control over its local distribution facilities. Thus, the purpose of the determination required by the Midwest ISO agreement is to ensure that the participating utility has properly classified the facilities it has transferred to the control of the Midwest ISO.

AmerenUE's witness, Edward Pfeiffer, testified that AmerenUE has applied the 7- Factor Test in classifying its energy delivery facilities between distribution and transmission.³⁸⁴ He also attached a list of the energy delivery facilities AmerenUE classified as transmission and transferred to Midwest ISO for operations.³⁸⁵

Staff's witness, Daniel Beck, testified that the list of transmission facilities identified by AmerenUE "appears to be reasonable". However, Beck indicated he had not reviewed the list and application of the FERC 7-Factor test on a line-by-line basis.³⁸⁶ Beck also explained that Midwest ISO's FERC electric tariff, which incorporates the requirements of the Midwest ISO agreement referenced by AmerenUE, requires the company to request a determination from the Commission. It does not require that the Commission approve that request. Thus, AmerenUE met the requirement of the Midwest ISO's tariff when it requested the determination, and the Commission does not actually need to approve the requested determination.³⁸⁷

Beck testified that if the Commission chooses to make the determination requested by AmerenUE, it should note that its determination does not have any ratemaking impact, and does not modify the terms of AmerenUE's participation in the Midwest ISO.

Conclusions of Law:

Midwest ISO's FERC Electric Tariff provides as follows:

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5. Power entering a local distribution system is consumed in a comparatively restricted geographical area.
 6. Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
 7. Local distribution systems will be of reduced voltage.

Pfeiffer Direct, Ex. 53, Page 3, Lines 1-11.

³⁸⁴ Pfeiffer Direct, Ex. 53, Page 3, Lines 22-23.

³⁸⁵ Pfeiffer Direct, Ex. 53, Schedule ECP-E1.

³⁸⁶ Beck Rebuttal, Ex. 217, Page 3, Lines 12-14.

³⁸⁷ Beck Rebuttal, Ex. 217, Page 2, Lines 25-28.

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Prior to the end of the fourth (4th) year of the Transition Period, each Owner shall file a request with the appropriate regulatory authority or authorities (unless a proceeding has already been initiated or completed) for a determination of which of its facilities are transmission facilities or which are distribution in accordance with the seven (7) factor test set forth in FERC Order No. 888, 61 Fed. Reg. 21,540, 21,620 (1996) or any applicable successor test. Each Owner shall use its best effort to cause these determinations to be made before the end of the Transition Period. Owners that are not subject to regulation by a regulatory authority shall apply to the Midwest ISO for such a determination.³⁸⁸

Decision:

Based on the uncontested testimony of Edward Pfeiffer, the Commission determines that AmerenUE has classified its energy delivery facilities in accordance with the 7-Factor Test prescribed by the FERC. This determination does not have any ratemaking impact, and does not modify the terms of AmerenUE's participation in the Midwest ISO.

IT IS ORDERED THAT:

1. The tariff sheets filed by Union Electric Company, d/b/a AmerenUE on April 4, 2008, and assigned tariff number YE-2008-0605, are rejected.
2. Union Electric Company, d/b/a AmerenUE is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order.
3. This report and order shall become effective on February 6, 2009.

Murray and Jarrett CC, concur;
Davis, C, concurs, with separate concurring opinion to follow;
Clayton, Chm, dissents;
and Gunn, dissents, with separate dissenting opinion to follow;
and certify compliance with the provisions of Section 536.080, RSMo.

³⁸⁸ Midwest ISO FERC Electric Tariff, First Revised Rate Schedule No. 1, Substitute First Revised Sheet No. 125. Beck Rebuttal, Ex. 217, Appendix C.

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NOTE: Other orders in this case can be found at pages 295, 297, 441, and 443.

CONCURRING OPINION OF COMMISSIONER JEFF DAVIS

Time constraints associated with the issuance of the order do not permit me to offer any further comment at this time. I chose to spend my time helping write an order based on the law and the facts in this case, not the fear of public perception.

Questions have been raised about the inherent reasonableness of the order and I wish to offer one more brief analogy in support of the Commission decision:

- Last year, the Illinois Commerce Commission voted to award AmerenUE's Illinois affiliates approximately \$163.5 million predicated on a 10.65% return on equity decision. All five Illinois Commissioners voted for decision.

- AmerenUE is comparable in size and customer base to its Illinois affiliates.

- AmerenUE requires a much greater degree of management skill than its Illinois affiliates because the company owns and operates its own fleet of electric generation plants, including a nuclear unit. Accordingly, a higher return is commensurate with the greater risk involved.

- One of AmerenUE's Illinois affiliates issued senior secured debt at a cost of approximately 8.75%. Equity is much more expensive than debt because there is no security for your investment and no guaranteed repayment schedule.

- This Commission independently reached a decision on all of the issues in this rate case that is approximately \$1 million different than that reached unanimously by all five Illinois Commerce Commissioners less than six months ago.

The Commission majority independently reached a decision that is close to the national average for return on equity and is nearly identical in outcome to the result reached by all five Illinois Commissioners. Our decisions should not unthinkingly mirror national trends or the decisions issued by neighboring state commissions, but these facts should be considered when reasonable people are trying to determine who is the most enlightened – the majority or the minority – in this case.

I respectfully concur with the majority opinion in all respects.

DISSENTING OPINION OF COMMISSIONER KEVIN D. GUNN
AND CHAIRMAN ROBERT M. CLAYTON III

These Commissioners concur with many of the majority positions contained in the Report and Order, including the exclusion of costs related to the potential construction of Callaway II from rate base. However, the majority's authorization of a 10.76 percent return on equity (ROE), rather than an ROE of between 10.0 and 10.2 percent, authorization of a fuel adjustment clause (FAC) that shifts an unreasonably high portion of risk upon the rate payers, failure to require AmerenUE to improve the materials used to market and educate customers about its Pure Power program, and rejection of the Hot Weather Safety Program pilot force these Commissioners to respectfully dissent.

Return on Equity

The majority's authorization of a 10.76 percent ROE, rather than an ROE of between 10.0 and 10.2 percent, especially combined with the authorization of a fuel adjustment clause that shifts 95 percent, virtually all, of the risk of rising fuel costs to the rate payers force these Commissioners to respectfully dissent on this issue.

While most of the Report and Order is based upon the record evidence, in making their findings on this issue, the majority seems more driven to justify a desired ROE than to analyze and accept the evidence presented in this case. In fact, the majority did not accept the analysis of any single expert that submitted testimony on this issue. Instead the majority took a buffet approach to each expert's testimony picking and choosing the various inputs and models, shifting and adjusting each expert's testimony until producing a number that fell in line with an ROE of 10.76 percent. In the instances where the majority could not manipulate an expert's recommendation sufficiently to move it into the range they appeared to be seeking, the majority simply found the testimony of that witness not credible. For example, the majority found Staff witness Mr. Hill not credible, because his recommendation was too low and because AmerenUE's witness, Dr. Morin, said Mr. Hill's analysis was flawed. Similarly, the majority ignores MEG's witness, Ms. LaConte, on the basis of her experience rather than an objective review of her analysis.

These Commissioners found most credible and persuasive the testimony of MIEC's expert Mr. Gorman who recommended the

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Commission allow AmerenUE an ROE of 10.2 percent without an FAC or 9.95 to 10.0 percent if an FAC is authorized.¹ Not only was Mr. Gorman's thorough and detailed analysis convincing, but his analysis stood up under cross-examination. Additionally, Ms. LaConte and the Public Counsel also supported an ROE of 10.0 to 10.2 percent.²

Additionally, these Commissioners disagree with the majority analysis that authorization of an FAC does not necessitate a reduction in ROE. Although the majority found the implementation of a fuel adjustment clause will reduce AmerenUE's business risk, they ignore the impact the higher level of risk AmerenUE faced prior to such authorization would have had on AmerenUE's bond rating. In contrast the majority makes a 20 basis point upward adjustment to Mr. Gorman's ROE calculation, or rather the majority's modified Gorman ROE calculation, to account for AmerenUE having a lower bond rating than Mr. Gorman's proxy companies, most of which have FACs. Further, AmerenUE's profile has not changed a great deal from its last ROE award of 10.2 percent in its last rate case.

These Commissioners believe the evidence supports an ROE in the range of 10.0 to 10.2 percent, depending on other factors included in the Report and Order. This range would be consistent with past AmerenUE awards and can fairly complement any type of FAC or other award granted by the Commission.

Fuel Adjustment Clause

As addressed in detail below, these Commissioners disagree with many of the majority's findings and positions regarding the FAC issue. However, due to the unprecedented turmoil in investment markets, these Commissioners could have joined with the majority on this issue but for the structure of the authorized FAC which inappropriately shifts 95 percent, virtually all, of the risk of rising fuel costs to the rate payer.

The record reflects that the objective conditions surrounding AmerenUE's fuel costs have not changed significantly since AmerenUE's last rate case. In that case the Commission found that fuel costs for AmerenUE were not sufficiently volatile to justify the use of an

¹ Gorman Direct, Ex. 600, Page 2, lines 5-7, and Tr. Page 543, lines 1-9, and Page 548, lines 2-25.

² LaConte Direct, Ex. 650, Page 2, lines 3-4; and Post-Hearing Brief of the Office of the Public Counsel, at Page 3.

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FAC.³ The bulk of AmerenUE's delivered coal costs, which will increase over the next several years, have been locked in by contract.⁴ Accordingly, as was found by the Commission in AmerenUE's last rate case, AmerenUE's fuel costs are rising, but are not "volatile."⁵ However, in the present case, the majority appears to have found this lack of volatility irrelevant on the basis that "regulatory lag in a rising cost environment will deprive AmerenUE of an opportunity to earn a fair return on its investment."⁶ Under the majority's reasoning, just and reasonable rates could never be set outside a recession, because rising costs in a historic test year jurisdiction, like Missouri, would never allow a utility to earn its authorized return.

The majority correctly finds that the test year fuel costs in this case do not include the increases that AmerenUE expects in its hedged fuel costs for 2009. The fact that these increases are not included in rates set in this case is due to the timing of AmerenUE's filing of the case. The timing of that filing was fully within AmerenUE's control. The difference does not reflect fuel price volatility, but simply a known increase. Accordingly the only volatility in AmerenUE's net fuel expense for 2009 primarily depends on volatility in the prices that it may receive from its off-system sales into the MISO energy market.⁷ The majority found that the volatility in market prices for off-system sales should be considered in the analysis of whether a company's fuel costs are volatile. These Commissioners disagree. The majority considered what it calls "net fuel cost" in its analysis of whether there is sufficient volatility in AmerenUE's fuel costs to justify authorization of an FAC. "Net fuel cost" is actual fuel costs, which the majority agrees are not independently volatile, minus off system sales income, which the majority found to be volatile. Neither Section 386.266 RSMo (Supp. 2008) nor Commission Rule 4 CSR 240-3.161 provide for an off-system sales adjustment mechanism. Section 386.266.1 RSMo expressly provide for an, "interim energy charge or periodic rate adjustments outside of general

³ *In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area*, Report and Order, Case No. ER-2007-0002, May 22, 2007, page 26.

⁴ Neff Direct, Ex. 47, Page 4, Lines 7-13. The precise numbers are highly confidential.

⁵ *In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area*, Report and Order, Case No. ER-2007-0002, May 22, 2007, page 23.

⁶ *Id.* at page 44.

⁷ Mantle Surrebuttall, Ex. 224, Pages 3-4.

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rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation.”

The fact that the FACs previously authorized by this Commission have provided for off-system sales revenues to flow through those FACs and thereby offset increased fuel costs with increases in off system sales revenues does not make it appropriate to consider fluctuations in off-system sales revenues in an analysis of whether an FAC is needed. Having off-system sales flow through an FAC avoids the potential for the utility to over-earn at the expense of its rate payers in the event both fuel costs and off-system sales revenues exceed those in base rates. Specifically, a company with an FAC will recover additional money from rate payers to cover fuel costs above those built into base rates for a specific period of time. It would not be appropriate for that company to collect off-system sales revenues in excess of the amount set in base rates during that same period, because the power sold off-system would be generated using that purchased fuel.

For the reasons set out above, awarding AmerenUE an FAC under normal economic conditions would not and could not be justified, as in AmerenUE’s last rate case. However, there is no question that the country is faced with unprecedented economic conditions. The competition for capital is fierce. The Commission must be mindful of risks faced by regulated utilities during times of economic downturn. Due to current market conditions, a FAC may be appropriate with a reasonable balance of risk and reward and sufficient consumer safeguards. Unfortunately, the majority shifts 95 percent, virtually all, of the risk on rate payers.

Given these Commissioners’ belief that AmerenUE’s fuel costs are not volatile and AmerenUE does not require an FAC to address volatile fuel costs, but rather to allow it to better compete in capital markets, the risk of increasing fuel costs should have been more equitably divided between the company and ratepayers. To accept the majority’s position would require these Commissioners to ignore the fact that every one of AmerenUE’s residential, small business and commercial customers are facing the same economic conditions that could justify authorizing any FAC for AmerenUE. This shared economic burden mandates a more equitable sharing of the fuel cost risk.

These Commissioners found more credible the testimony of each of the witnesses testifying on this issue that were not sponsored by AmerenUE each of whom testified that the 95/5 sharing mechanism ultimately adopted by the majority was inappropriate and that a more

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balanced sharing of fuel cost risk should be adopted.⁸ Accordingly, these Commissioners would have considered authorizing an FAC for AmerenUE that balanced the risk between company and rate payers at 50 percent. These Commissioners would also have considered the potential for additional risk sharing by customers with additional consumer protections such as the FAC cap proposed by MIEC expert witness Maurice Brubaker or customer benefits such as a reduction in the ROE award. The majority's decision to eliminate virtually all, 95 percent, of AmerenUE's fuel cost risk and shift that risk directly on its ratepayers force these Commissioners to respectfully dissent on this issue.

Pure Power Program

These Commissioners disagree with the majority's continuation of AmerenUE's Pure Power program without significant changes. The record clearly reflects the great potential for customer misunderstanding. AmerenUE and 3 Degrees should be required to improve the materials used to market and educate customers about the Pure Power program so that customers know what they are purchasing.

Having thoroughly analyzed the Pure Power marketing and customer education materials filed in this case, these Commissioners have serious concerns that many of the people participating in the program believe they are paying for AmerenUE to invest in renewable technologies that deliver cleaner energy to the customers' homes. Although the purchase of a REC can stimulate demand for additional renewable energy, RECs are for the purchase of power generated in the past and do not provide any "clean" energy directly to AmerenUE ratepayers.

This case represents the Commission's only opportunity to ensure that the marketing materials in question are appropriately modified until either AmerenUE's files its next rate case or a complaint is filed against the company. Accordingly, although these Commissioners strongly support programs that encourage investment in clean energy, including AmerenUE's Pure Power program, the majority's decision not to require AmerenUE to submit revised Pure Power marketing and customer materials to the Commission for approval forces these Commissioners to respectfully dissent on this issue.

Hot Weather Safety Program

⁸ Brubaker Direct, Ex. 606, Page 5, lines 8-21; Brubaker Direct, Ex. 607, Page 2, lines 16-18, and Page 9, lines 2-23; Brubaker Surrebuttal, Ex. 609, Page 4, lines 13-20; Cohen Direct, Ex. 500, Page 23, line 20 to page 24, line 5; and Kind Rebuttal, Ex. 404, Page 6, lines 21-23.

These Commissioners strongly dissent to the majority's rejection of the hot weather safety pilot program proposed by AARP. AARP asked the Commission to order AmerenUE to instigate a limited, experimental pilot program designed to encourage low-income seniors to turn on their air conditioners during hot weather by offering them a \$5.00 per day bill credit for the 9.5 extreme heat days experienced during an average summer.¹

These Commissioners concur with the majority finding that seniors refusing to turn on their air conditioners in very hot weather are at a greater risk of dying from heat related illness, and their finding that the cost of providing the bill credits in question would only be \$114,000. These Commissioners also share the majority's stated concern for the health of AmerenUE's elderly citizens. However, the majority's determination that AARP's proposed pilot should be rejected on the basis that "[t]his sort of program has never been tried anywhere else and AARP admits it does not really know how it will work," and "there is no indication that a bill credit of \$5.00 per day will actually prompt an at risk elderly person to turn on their air conditioning," force these Commissioner's to dissent.

These Commissioners cannot agree with the majority's refusal to even study ways to potentially reduce heat related deaths. The majority finding that there is no evidence the proposed pilot program would convince an at-risk person to turn on their air conditioning is correct. However, it is also true that there is no basis to assume it would not work.

Instead of opting for a small scale, scientifically designed pilot study that would answer the question of whether such a bill credit could convince at risk seniors to use their air conditioning, the majority arbitrarily decided it cannot work. These Commissioners believe the majority's "can't" attitude must be changed to at least a "we'll try" attitude. By design, a "pilot program" is a test to see if certain actions, in this case, a bill credit, can influence a desired reaction, in this case get at-risk individuals to use their air conditioning.

¹ Howart Direct, TR page 1165, line 20 to page 1166, line 2.

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These Commissioners note that AmerenUE has done some good work in this area and they should be commended for it, but we can and must do better.¹

In conclusion, the majority has granted an ROE greater than is supported by the record. They have also granted an FAC whose sharing mechanism is not equitable in its sharing of risk. For these reasons, coupled with the majority's inaction on the Pure Power program and rejection of the Hot Weather Safety program forces these Commissioners to respectfully dissent.

For the foregoing reasons, these Commissioners respectfully dissent.

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Authority to Transfer Functional Control of Certain Transmission Assets to the Southwest Power Pool, Inc.

Case No. EO-2009-0179

Decided: February 4, 2009

Electric §46. The Commission approved a Stipulation and Agreement facilitating KCP&L Greater Missouri Operations Company's participation in the Southwest Power Pool, Inc. by allowing KCP& L to transfer functional control of its assets to the Southwest Power Pool, Inc.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves a Stipulation and Agreement facilitating KCP&L Greater Missouri Operations Company's participation in the Southwest Power Pool, Inc.

Background

¹ The case of *Johnson v. Missouri Dept. of Health and Senior Services*, 174 S.W.3d 568, (Mo. App. 2005) serves as an illustration of the importance of this program. In *Johnson*, a nursing home administrator was disciplined for failing to recognize the need to timely initiate air conditioning for her skilled nursing facility. An unchecked rise in outside temperature of only 11 degrees (from 80 to 91 degrees) over a four day period resulted in the death of four residents, ranging in age from 66 to 88, from hyperthermia, despite the increased use of fans and attempts to keep the residents fully hydrated. This tragic incident demonstrates just how susceptible the elderly are to heat and how the simple use of air conditioning would have saved these lives. Clearly, any program that promotes the use of air conditioning to reduce unnecessary loss of life is worth trying.

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On November 12, 2008, KCP&L Greater Missouri Operations Company filed an application with the Missouri Public Service Commission to transfer functional control of certain transmission assets to the Southwest Power Pool, Inc. As required,² the Commission issued an Order Directing Notice of Tax Impact, wherein the Commission informed the clerks of those counties included in the company's service area that there would be no tax impact. The Commission also ordered that notice of the application be properly given and that an intervention deadline be set. Upon their unopposed applications, the Commission granted interventions to Dogwood Energy, LLC, The Empire District Electric Company and Southwest Power Pool, Inc.

On January 27, 2009, all of the parties filed a Stipulation and Agreement with an attached Service Agreement. The signatories include; KCPL–GMO, the Staff of the Commission, the Office of the Public Counsel, Southwest Power Pool, Inc., The Empire District Electric Company and Dogwood Energy, LLC.

The Agreement

The Agreement is similar to the agreement approved by the Commission in Case No. EO-2006-0142³ and is for an interim period until September 30, 2013. During the interim, the Agreement provides for ongoing scrutiny of the cost and benefits of KCPL–GMO's continued participation. Under certain conditions, the interim period may be prematurely terminated or may be extended at the discretion of the Commission.

There are a number of economic parameters associated with participation in the SPP, which include various charges for administration and upgrades, cost and revenues related to the operation of the SPP Energy Imbalance Service Market and charges for ancillary services not self-provided. The parties affirm that no future ratemaking treatment has been agreed upon for these charges.

The parties have agreed that KCPL–GMO's participation with the SPP is for a term to end on September 30, 2013. Further, KCPL–GMO has agreed to file a pleading with the Commission regarding the company's continued participation two years prior to the conclusion of the interim period. Also, the parties have acknowledged that, prior to the end of the interim period, the Commission has the jurisdiction to terminate, modify or impose further conditions on KCPL–GMO's

² Section 393.190.1 RSMo. 2000.

³ In Case No. EO-2006-0142 the Commission approved KCP&L's participation in the SPP.

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participation with the SPP.

Conclusion

Having reviewed the Stipulation and Agreement, the Commission finds that the proposed transfer of KCPL–GMO’s assets to the SPP is not detrimental to the public interest and the Agreement shall be approved.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement filed by the signatories is approved.
2. KCP&L Greater Missouri Operations Company is authorized to transfer to the Southwest Power Pool, Inc., conditional and interim functional control of certain transmission assets.
3. KCP&L Greater Missouri Operations Company and the Southwest Power Pool, Inc., shall comply with the Stipulation and Agreement and the attached Service Agreement.
4. KCP&L Greater Missouri Operations Company and the Southwest Power Pool, Inc., are authorized to enter into, execute and perform in accordance with the terms of all other documents, not inconsistent with the Stipulation and Agreement, which may be reasonable necessary and incidental to the performance of the transaction.
5. During KCP&L Greater Missouri Operations Company’s transfer of functional control of certain transmission assets, such assets and the control thereof remains subject to the Missouri Public Service Commission’s jurisdiction as specifically described in the Stipulation and Agreement.
6. This order shall become effective on February 10, 2009.
7. This case shall be closed on February 11, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(16) Integrated Resource Planning Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(17) Rate Design Modifications to Promote Energy Efficiency Investments Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(16) Consideration of Smart Grid Investments Standard as Required by Section 1307 of the Energy Independence and Security Act of 2007.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(17) Smart Grid Information Standard as Required by Section 1307 of the Energy Independence and Security Act of 2007.

*Case No. EO-2009-0247, EO-2009-0248, EO-2009-0249, EO-2009-0250
Decided: February 6, 2009*

Electric §1. The Missouri Public Service Commission changes the case numbers for these dockets to reflect their legal classification as workshops and not contested cases.

Electric §7. Personal jurisdiction is irrelevant in workshop matters because the Commission is not taking any action affecting any public utilities under its jurisdiction, supervision or control.

ORDER AND NOTICE REGARDING CLASSIFICATION OF DOCKETS AND EX PARTE RULE

The Missouri Public Service Commission is changing the case numbers for these dockets to reflect their legal classification as workshops and not contested cases.

On December 17, 2008, the Commission granted its Staff's motions requesting that the Commission establish these dockets. Staff's requests designated these dockets with the letters EO, implying that they were contested cases or that a contested case may materialize.

The Missouri Administrative Procedures Act defines a contested case as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after

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hearing.”¹ Contested cases involve the Commission’s adjudicative power, applying existing law to past facts. Workshops do not constitute contested cases, even if they result in a determination that the Commission will engage in rulemaking. Rulemaking is an exercise of the Commission’s legislative power, making new law applying to future events.²

In contrast to an adjudicatory trial-like contested case, workshops and rulemakings contemplate that the Commission will meet interested members of the public face to face providing an opportunity for oral presentation and comment without the formality of a trial procedure.³ Consequently, the Commission’s *ex parte* contact rules do not apply in these workshops.

On December 22, 2008, the Commission directed its Staff to explain why it had classified these workshops as “EO” cases, a designation reserved for contested cases or non-contested cases requiring a decision that affects the legal rights, duties, or privileges of specified persons. Staff responded that consequences could follow these workshops other than a rulemaking. However, Staff fails to explain how any of the possible scenarios it anticipated are in any way relevant to the proper classification of these workshops.

In Staff’s motions to open these dockets, Staff offered three possible results of the workshops: (1) no further action; (2) opening a rulemaking; and (3) directing individual electric utilities to include testimony in a general rate case. However, none of those possible results constitutes a legal right, duty, or privilege that the law requires the Commission to determine only after hearing. A contested case or rulemaking commences only upon prescribed notice and there is a separate record upon which the Commission renders a decision.

In support of the current contested case designation, Staff cites *State ex rel. Sierra Club v. Missouri Public Service Com’n*.⁴ In that case, the Commission held a workshop,⁵ which resulted in a stipulation, which the parties filed to initiate a contested case.⁶ The contested case

¹ Section 536.010(2), RSMo Supp. 2008.

² “The identifying badge of a modern administrative agency is the combination of judicial power (adjudication) with legislative power (rulemaking).” *McNeil-Terry v. Roling*, 142 S.W.3d 828, 835 (Mo. App. 2004).

³ *State ex rel. Atmos Energy Corp. v. Public Service Com’n of State*, 103 S.W.3d 753, 759-760 (Mo. banc 2003).

⁴ Case No. WD66893, 2007 WL 581652 (Mo. App., W.D. 2007), Ulrich, P.J.

⁵ EW-2004-0596.

⁶ EO-2005-0329.

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resulted in a decision, which the Court of Appeals reversed. Staff argues that holding a workshop led to the reversal. The Commission disagrees. The basis for the reversal was that the document initiating the contested case was titled a "Stipulation and Agreement," not that a workshop preceded the contested case.⁷ Also, the Missouri Supreme Court granted transfer of that decision.⁸ Therefore, the history of *State ex rel. Sierra Club v. Missouri Public Service Com'n* does not support classifying these workshops as contested cases.

At the June 20, 2004 prehearing conference held in EW-2004-0596, Regulatory Law Judge Lewis Mills acknowledged some of the challenges the Commission could face in a workshop when he stated that if the docket arrived at a point in "which there are disputed issues that need to be resolved by the Commission, those will have to be brought up in a different case . . ."⁹ Judge Mills correctly recognized that in workshop docket there is no resulting Commission Order, and there are "no ex parte rules, there are no parties, there are no contested issues."¹⁰ "It's [the workshop docket is] designed as information gathering, information exchange, rather than a dispute resolution or a contested issue resolution case."¹¹ The Commissioners themselves even participated at various levels in the KCPL workshop, something which would be inappropriate if the process were intended to resolve, or settle a matter.

Among multiple points of error alleged in Sierra Club's petition for review of contested Case No. EO-2005-0329 with the circuit court were the following allegations concerning the prior workshop case:

16. The Order is unlawful, unjust and unreasonable because it is the result of an informal workshop process that did not create a record capable of being reviewed, and that was not reviewed, by the PSC in the manner required by § 536.080, RSMo. The Order is therefore not supported by substantial and competent evidence.

28. The Order is unjust, unlawful and unreasonable because the PSC had no jurisdiction or authority to approve as a whole a stipulation which is the outcome of

⁷ *State ex rel. Sierra Club*, 2007 WL 581652 at 9.

⁸ Case No. SC88530.

⁹ EW-2004-0596, Prehearing Conference, T. 7-8, June 30, 2004.

¹⁰ *Id.*

¹¹ *Id.*

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an informal workshop process. No statute or rule prescribes a workshop or defines or limits its content or procedure. This resulted in a process that was contrary to law, arbitrary, capricious, not in the public interest, and a denial of due process, notwithstanding the more circumscribed hearing before the Commission.¹²

The circuit court understood the difference between workshops and adversarial contested cases and astutely discredited Sierra Club's allegations in its judgment stating:

11. **The Commission did not base its decision to approve the Experimental Regulatory Plan embodied in the Stipulation on the workshops.** Rather, its decision was based on the competent and substantial evidence submitted on the record [in the contested case], which consisted of the pre-filed testimony of seven KCPL and one Public Counsel witnesses, the live testimony of numerous other witnesses, and over 50 exhibits. **While the workshop process was a constructive, nonadversarial way for KCPL to present issues for discussion and to obtain the views of various parties (including Appellants who attended many of the sessions), it was only a prologue to the Stipulation,** and the specific resource, financial and customer-related proposals which it contains.

30. Therefore, contrary to the Appellants' suggestion, **the Commission conducted a comprehensive, adversarial hearing** where it considered all of the pertinent issues at a time proximate to KCPL's plan to construct on latan 2. The Commission considered all appropriate issues within its jurisdiction and issued a specific order confirming that the plans to proceed with latan 2 were in the public interest. No more is required by Missouri law. KCPL has exercised its authority at the latan Generating Station continuously since the issuance of the 1973 CCN, and it needs no further permission

¹² Case No. 05AC-CC00917: *State ex rel. Sierra Club and Concerned Citizens of Platte County v. Missouri Public Service Commission*, Petition for Review, Paragraphs 16, 28, filed September 22, 2005.

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from the Commission to begin work on item 2. Cf. *In re Kansas City Power & Light Co.*, 1981 Mo. PSC LEXIS at 13-18 (Case No. ER-81-42) (1981).¹³

Though EO-2005-0329 proceeded to the Western District, the issue decided there had nothing to do with the workshop classification of EW-2004-0596 and whether the Commission's *ex parte* rules apply to workshops.

Further, the Western District's holding is not good law because the Missouri Supreme Court accepted transfer of this case on June 26, 2007. Ultimately the Supreme Court case was dismissed on July 11, 2007 pursuant to a joint motion to dismiss filed by appellants and respondents leaving the Western District's decision of questionable legal precedent.¹⁴

Recently, the Commission considered a different set of Public Utility Regulatory Policies Act ("PURPA") standards in a workshop.¹⁵ The Commission held On-the-Record proceedings in those workshops and even elicited the sworn testimony of subject matter experts to assist them with evaluating the standards and with determining whether any other type of proceeding would need to follow those workshops. No cross-examination of those witnesses was allowed, nor would it have been appropriate to do so in the posture of those workshops. Consequently, such testimony had no evidentiary value for deciding any specified party's legal rights, duties, or privileges.¹⁶ Even the taking of

¹³ Case No. 05AC-CC00917: *State ex rel. Sierra Club and Concerned Citizens of Platte County v. Missouri Public Service Commission*, Findings of Fact, Conclusions of Law and Judgment, Paragraphs 11, 30, issued on March 16, 2006. (Emphasis added.)

¹⁴ See Supreme Court Case Docket of case number SC 88530.

¹⁵ See Case Nos. EO-2006-0493, 0494, 0495, 0496, and 0497.

¹⁶ Fundamental aspects of due process include the ability to cross-examine witnesses and to present evidence and cross examination is required in administrative cases once they involve the agency's quasi-adjudicatory authority for deciding contested issues. *Colyer v. State Bd. of Registration For Healing Arts*, 257 S.W.3d 139, 146 (Mo. App. 2008); [See also *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Jamison v. State, Department of Social Services*, 218 S.W.3d 399, 405-415 (Mo. banc 2007); *Mikel v. Pott Industries/Saint Louis Ship*, 910 S.W.2d 323, 327 (Mo. App. 1995). "The purpose of cross-examination is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of the witness. **When the evidence is critical to the issues and necessary to sustain a proponent's burden of proof, cross-examination is essential to testing the reliability of evidence.**"

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testimony from subject matter experts in a workshop does not convert the workshop into a contested case.

While the Commissioners have many opportunities, through conferences and educational seminars, to gather information, the free flow of information and ideas is always educational and essential for the Commissioners to be able to exercise their duties in a totally informed capacity; especially in the highly specialized subject matter arena of public utilities that interweaves complex issues of law, accounting and engineering. Obtaining information in non-adjudicatory matters, such as workshops, is appropriate even if a contested case, involving an issue discussed in the workshop, later commences. Obtaining information in this fashion does not create an issue of bias in future cases. “Administrative decisionmakers *are expected to have* preconceived notions concerning policy issues within the scope of their agency’s expertise.”¹⁷ “Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances.”¹⁸ An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence. “Conversely, any administrative decisionmaker who has made an unalterable prejudgment of operative adjudicative facts is considered biased.”¹⁹

THE COMMISSION ORDERS THAT:

1. Commission docket numbers EO-2009-0247, EO-2009-0248, EO-2009-0249, and EO-2009-0250 are classified as workshops.
2. The Commission’s Data Center shall change the docket numbers of EO-2009-0247, EO-2009-0248, EO-2009-0249, and EO-2009-0250 to reflect the appropriate classification in the Commission’s Electronic Information and Filing System by changing the “EO”

(Emphasis added and internal citations omitted). *State ex rel. Utility Consumers Council v. Public Service Commission*, 562 S.W.2d 688, 694 (Mo. App. 1978).

¹⁷ *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990) (emphasis added) (citing *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

¹⁸ *Id.* (citing *Wilson v. Lincoln Redevelopment Corp.*, 488 F.2d 339, 342-43 (8th Cir. 1973)); *Hortonville*, 96 S.Ct. at 2314.

¹⁹ *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District*, 718 S.W.2d 195, 199 (Mo. App. 1986).

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designation in the docket numbers of these matters to “EW”.

3. The Commission’s *ex parte* rule, Commission Rule 4 CSR-240.4.020 is inapplicable to these dockets.

4. This order shall become effective immediately upon issuance.

Harold Stearley, Senior Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

NOTE: Another order in this case can be found at page 423.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(16) Integrated Resource Planning Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(17) Rate Design Modifications to Promote Energy Efficiency Investments Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(16) Consideration of Smart Grid Investments Standard as Required by Section 1307 of the Energy Independence and Security Act of 2007.

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(17) Smart Grid Information Standard as Required by Section 1307 of the Energy Independence and Security Act of 2007.

*Case No. EO-2009-0247, EO-2009-0248, EO-2009-0249, EO-2009-0250
Decided: February 9, 2009*

Electric §1. Having changed the file numbers of these dockets to properly reflect their legal classification as workshops and not contested cases, the Missouri Public Service Commission closes these file numbers and directs the workshop participants to file information under the corrected file numbers.

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Electric §7. Personal jurisdiction is irrelevant in workshop matters because the Commission is not taking any action affecting any public utilities under its jurisdiction, supervision or control.

ORDER CLOSING DOCKETS AND PROVIDING DIRECTION FOR FUTURE FILINGS

On February 6, 2009, the Commission ordered the docket numbers for these matters to be changed to reflect their legal classification as workshops and not contested cases. As part of that order, the Commission directed its Data Center to change the “EO” designation in the docket numbers to “EW.” The change in designation necessitated changes in the sequential docket numbers. Consequently, EO-2009-0249 is now listed in the Commission’s Electronic and Filing System as EW-2009-0290; EO-2009-0247 is now EW-2009-0291, EO-2009-0248 is now EW-2009-0292 and EO-2009-0250 is now EW-2009-0293. The style of the dockets shall remain unchanged.

Dockets EO-2009-00247, EO-2009-0248, EO-2009-0249 and EO-2009-0250 shall now be closed. Any future filings in these workshops shall be made under the newly assigned docket numbers, and all such filings shall reflect the appropriate docket number assignment.

THE COMMISSION ORDERS THAT:

1. Dockets EO-2009-00247, EO-2009-0248, EO-2009-0249 and EO-2009-0250 shall now be closed.
2. Any future filings in these workshops shall be made under the newly assigned docket numbers, and all such filings shall reflect the appropriate docket number assignment.
3. This order shall become effective immediately upon issue.

Harold Stearley, Senior Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

NOTE: Another order in this case can be found at page 417.

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**In the Matter of Atmos Energy Corporation's Tariff Revision
Designed to Consolidate Rates and Implement a General Rate
Increase for Natural Gas Service in the Missouri Service Area of
Atmos**

*Case No. GR-2006-0387
Issue Date: February 11, 2009*

Gas §1. The Missouri Public Service Commission concludes that Atmos filed a detailed Annual Report that complies with the Commission's general directive with regard to providing information on the impact of its fixed delivery charge rate design on energy efficiency and conservation. The Office of The Public Counsel provides no valid reason to launch an investigation when another report is already scheduled to be completed once additional data has been collected.

Gas §7. The Commission lost jurisdiction to amend, clarify or take any other action with regard to its Report and Order, issued on February 22, 2007, once the appeal of that decision was accepted by the courts.

However, the courts have no jurisdiction to review the Commission's interlocutory orders concerning ancillary issues, and finding Atmos' report to be compliant and denying the Office of The Public Counsel's request for an investigation related to the report are interlocutory.

**NOTICE AND ORDER FINDING ATMOS ENERGY CORPORATION'S
ANNUAL REPORT TO BE IN COMPLIANCE, AND DENYING
PUBLIC COUNSEL'S REQUESTS FOR CLARIFICATION
AND TO OPEN AN INVESTIGATION**

Syllabus: The Missouri Public Service Commission accepts Atmos Energy Corporation's Annual Report and denies the Office of the Public Counsel's challenges to the report's compliance and its request to open an investigation.

Background and Procedural History

The Commission issued its Report and Order ("Order") in this matter on February 22, 2007; bearing an effective date of March 4, 2007. Atmos Energy Corporation ("Atmos") filed compliance tariffs for rates and rate design, Tariff Tracking No. YG-2007-0602, which were approved to become effective April 1, 2007. These tariffs replaced Atmos' prior tariff (JG-2003-0046) in its entirety. In addition to compliance tariffs for rates and rate design, Atmos filed compliance tariffs to effectuate its Energy Conservation and Efficiency Program, Tariff Tracking No. YG-2007-0957, which were approved to become effective on August 31, 2007.

The Office of the Public Counsel ("Public Counsel") sought a Writ

of Review in the Cole County Circuit Court, and on August 27, 2008, the Court entered a judgment reversing the Commission's decision and remanding for further proceedings. Atmos filed its notice of appeal with the Missouri Court of Appeals, Western District, on October 3, 2008, and the Western District currently has jurisdiction over the Commission's final Order.¹ The Commission notes that the circuit court's judgment does not invalidate the Order while an appeal is pending at the Missouri Court of Appeals or the Missouri Supreme Court.² Consequently, the Order remains in full force and effect and unchanged by the circuit's court's decision.

Pursuant to the Commission's Order, Atmos filed reports on its Energy Conservation and Efficiency Program on May 15, 2008 and on August 29, 2008. Atmos also filed its Annual Report ("Report") regarding the impact of its fixed delivery charge rate design (also known as the single fixed variable rate design) on energy efficiency and conservation on November 24, 2008. Public Counsel objected to Atmos' Report on December 4, 2008. Public Counsel claimed the Report did not comply with the Commission's Order and requested an investigation. Staff filed a reply to Public Counsel's objection on January 5, 2009. Public Counsel filed a surreply to Staff's reply on January 15, 2009, and Atmos filed a response on January 15, 2009.

Atmos' Report – Impact of its Rate Design on Energy Efficiency and Conservation

Atmos' Annual Report:

- (1) summarizes the program;
- (2) describes how the new rate design has aligned the interests of the customers and the company to encourage conservation;
- (3) identifies its contributions to the program, i.e. \$165,000 for the first year and \$173,000 for the second year;
- (4) recites expenditures of several thousand dollars more for public education about the program and delineates all steps taken to promote public education regarding the program;
- (5) lists the current number of customers participating

¹ Western District Case No. WD70219 is not yet disposed.

² *State ex rel. GTE North, Inc. v. Missouri Public Service Com'n*, 835 S.W.2d 356, 363 - 368 (Mo. App. 1992) (This case interprets the construction and interaction of Sections 386.270 and 386.540).

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in the program, i.e. 12 homes weatherized and 6 more in progress;

(6) observes that only a few months of consumption data is available post-weatherization;

(7) relates that after two years it will have available a full year's data, at which point it can perform a more complete evaluation;

(8) elucidates that 46 customers have received High Efficiency Space Heating rebates related to replacement of less efficient heating equipment;

(9) recounts that the average equipment removed by customers during the first program year had an Annual Fuel Utilization Efficiency ("AFUE") of 68%, while the average AFUE of the new equipment was 93%. As a direct result of the installed higher efficiency heating equipment, it is estimated that the average customer who has taken advantage of this rebate will now consume approximately 270 Ccf less per year. This translates to over \$240 in savings over a twelve month period (assuming an average monthly PGA of .90/Ccf);

(10) outlines additional benefits from the fixed delivery charge rate design beyond the Energy Efficiency and Conservation Program including increased stability in rates, better customer management of energy cost, and lower winter bills; and,

(11) establishes that the two primary concerns identified with implementing a fixed delivery charge rate design have not materialized. The first concern centered around the possibility that there would be a large number of customer complaints during the months following the implementation of the new rate design, as customers experienced increased gas bills during the summer. The other concern was that the Company might experience an increased level of customers leaving the system to avoid paying the fixed delivery charge during months where they consume little or no natural gas thereby placing a greater financial burden on the remaining

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ratepayers.³

Public Counsel's Objection

Public Counsel argues that the Report does not analyze whether the Order, by implementing the single fixed variable ("SFV") rate design, removed price signals and increased usage. Public Counsel requests the Commission issue an order requiring Atmos to amend its Report to fully comply with the Order, and further requests the Commission open an investigation into Atmos' rate design.

Staff's Reply

Staff correctly notes that the only guidance provided by the Commission regarding the filing of Atmos' Report was one sentence appearing in the body of the Order that was repeated as Ordered Paragraph No. 9, which states:

Finally, if the fixed delivery charge rate design is implemented, Atmos shall file on an annual basis a report with the Commission for the purpose of evaluating the effect of a fixed delivery charge rate design on energy efficiency and conservation. (Report and Order, pp. 22-23).

Staff argues out that Public Counsel's allegations of Atmos' non-compliance are merely another challenge to the SFV rate design. Staff believes Atmos' report is in compliance with the Commission's Order.

Staff also states there is no basis for OPC's requested "investigation." Pursuant to the collaborative process prescribed in the Order, the Collaborative Members (Atmos, Commission Staff, the Missouri Department of Natural Resources – Energy Center, and Public Counsel) helped design the Program Description, General Terms and Conditions, and the specific components of the Conservation Efforts

³ The Company reports that: (1) the transition to the new rate design has been virtually seamless; (2) it has experienced only a handful of customer inquiries/complaints related to the new rate design at the call center, local office, and Commission levels combined; (3) it has not experienced the level of customer complaints or interest that was initially anticipated; and (4) it has not experienced greater residential customer attrition since the implementation of the fixed delivery charge design. Atmos' average change in the number of residential customers for the five annual periods from April 2001 through March 2002, to April 2006 through March 2007 was a loss of 633 customers per year; and for the same period following the new rate implementation (April 2007 through March 2008), the Company's residential customers decreased by 733. The four month period of April 2008 through July 2008, shows a residential decrease of 204 customers. The projected annual loss based on the 204 customers leaving the system in 4 months time would be approximately 612 customers. This suggests that the Company has not experienced a significant change in the number residential customers as it relates to the new rate design.

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constituting Atmos' Energy Conservation and Efficiency Program. In accordance with the parameters agreed upon by the Collaborative Members (including Public Counsel), Atmos has been providing the Collaborative Members quarterly reports and has filed Biannual Reports with the Commission. In addition, both the *FILING MEMORANDUM Regarding Energy Conservation and Efficiency Program* and the tariff sheets filed by Atmos on June 28, 2007,⁴ inform the Commission that Atmos will conduct a comprehensive evaluation of the program in the following manner:

"At the end of the second program year, the Company will perform an evaluation of [the program] to evaluate the success of the program in accordance with parameters developed by the Collaborative Members. Based on discussions of the Collaborative Members to date, it is anticipated that such evaluation will address the success of the program in terms of participation, increased affordability, reduced arrears, reduced late payments, disconnects/reconnects and reduced uncollectibles. Information on customer usage and payments will be included in the evaluation." Moreover, Collaborative Members will continue to actively participate in the program evaluation process.

Staff observes that an evaluation done at the end of the second program year, as already planned, will benefit from Atmos having collected more meaningful and ripe data. At present there is only data for a single 12-month period after the rollout of the SFV delivery charge (April 2007 – March 2008). According to Staff, not only is data from a single period inadequate, that data reflects the initial program start-up. Atmos must collect data from a second period, especially after the program has been fully implemented, before it can provide a more meaningful evaluation.

Staff also correctly points out that Atmos' currently approved Tariff Sheet No. 115 (Energy Conservation and Efficiency Program) provides that the program will remain in effect unless the program is modified or terminated by the Commission, or a court invalidates or otherwise overturns the Commission's Order. Given that the circuit court's judgment to reverse and remand is on appeal, the Commission

⁴ See EFIS Docket No. 226. EFIS is the Commission's Electronic Information and Filing System.

does not yet know whether its Order will remain intact or whether an ultimate remand will involve any issue connected with the rate design and its interrelation to the conservation and efficiency program.

Public Counsel's Surreply

Public Counsel filed a surreply to Staff's reply reiterating its previous requests; however, Public Counsel changed its position on its request for an investigation agreeing with Staff that a new docket to investigate might not be necessary at this time. Public Counsel also substituted a completely different request for the Commission to newly interpret its Order to provide the parties with guidance as to what the Commission's expectations were regarding Atmos' Report.

Atmos' Response

Atmos also responded and fully concurred with Staff's analysis.

Conclusions and Decision

After reviewing the parties' filings and the Commission's Order, the Commission concludes that Atmos filed a detailed Annual Report that complies with the Commission's general directive with regard to providing information on the impact of its fixed delivery charge rate design on energy efficiency and conservation. Atmos' approved tariff for its Energy Conservation and Efficiency Program provides that the program will remain in effect unless the program is modified or terminated by the Commission, or a court invalidates or otherwise overturns the Commission's Order. The Commission's Order is still in full force and effect while the case remains on appeal, and it is unknown what, if any, part of the Commission's decision will be affected by the appellate court's or circuit court's rulings.

The courts have jurisdiction to review the Commission's Order on the merits of the case.⁵ The Commission lost jurisdiction to amend, clarify or take any other action with regard to the Order when the appeal started.⁶ Even if the Commission still had jurisdiction, it would also be unwise for the Commission to take such action without knowing what the courts will ultimately do – premature action may merely result in

⁵ Their limited jurisdiction to review final administrative orders on the merits of a case is outlined clearly in the Mo. Constitution, Art. V, Sec. 18 and in Sections 536.100, 536.150, and 386.510. This limited jurisdiction is also thoroughly delineated in *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State of Mo.*, 26 S.W.3d 396, 399-401 (Mo. App. 2000).

⁶ *Woodman v. Director of Revenue*, 8 S.W.3d 154, 156-157 (Mo. App. 1999); *Sheets v. Labor and Industrial Relations Commission*, 622 S.W.2d 391, 394 (Mo. App. 1981); *Eleven Star, Inc. v. Director of Revenue*, 764 S.W.2d 521, 522 (Mo. App. 1989); *Dillon, d/b/a Home Satellite Systems v. Director of Revenue*, 777 S.W.2d 326 (Mo. App. 1989).

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addressing issues that do not require revision and result in a subsequent appeal.

However, the courts have no jurisdiction to review the Commission's interlocutory orders concerning ancillary issues.⁷ So while the Commission will take no action that would bear on its final Order, it will rule on Public Counsel's current requests so long as that ruling has no effect on the Order. Public Counsel, as Staff so thoroughly outlined, is incorrect about Atmos' report. The report is in compliance with the Order, and Public Counsel gives no valid reason to launch an investigation when another report is already scheduled to be completed once additional data has been collected. Moreover, the Commission may be performing another review of Atmos' SFV rate design depending upon the courts' directives once the appellate process is complete.

THE COMMISSION ORDERS THAT:

(1) The "Annual Report of Atmos Energy Corporation Regarding the Company's Fixed Delivery Charge Rate Design and Its Impact on Energy Efficiency and Conservation," filed on November 24, 2008 by Atmos Energy Corporation was timely filed and complies with the Missouri Public Service Commission's February 22, 2007 Report and Order.

(2) The Office of the Public Counsel's request for an investigation into Atmos Energy Corporation's rate design is denied.

(3) The Office of the Public Counsel's request for the Commission to further interpret and clarify the Missouri Public Service Commission's February 22, 2007 Report and Order is denied.

(4) This order shall become effective on February 21, 2009.

Murray, Davis, Jarrett, and Gunn, CC., concur.
Clayton, Chm., concurs, with separate concurring opinion to follow.

Stearley, Senior Regulatory Law Judge

⁷ *Id.*

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**In Re: Union Electric Company's 2008 Utility Resource Filing
Pursuant to 4 CSR 240- Chapter 22**

*Case No. EO-2007-0409
Decided: February 19, 2009*

Electric §42. The proceeding to consider the company's Integrated Resource Plan is not a "contested case" under Chapter 536 RSMo and therefore no hearing is required before the Commission addresses identified deficiencies in the plan.

Electric §42. AmerenUE's 2008 Integrated Resource Plan and resource acquisition strategy did not demonstrate compliance with the Commission's IRP rule, and the Commission ordered the company to file its next IRP a year early.

**FINAL ORDER REGARDING AMERENUE'S
2008 INTEGRATED RESOURCE PLAN**

On February 5, 2008, Union Electric Company, d/b/a AmerenUE, filed its 2008 Integrated Resource Planning filing (IRP), as it was required to do by the Commission's Integrated Resource Planning Rule, 4 CSR 240-22.080(1). The IRP rule requires investor-owned electric utilities, such as AmerenUE, to engage in a resource planning process that considers all options, including demand side efficiency and energy management measures, to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest. The purpose of the IRP filing is to demonstrate that AmerenUE has engaged in a planning process that complies with the requirements of the rule.

As required by the IRP rule, the Commission gave notice of AmerenUE's IRP filing and invited interested parties to intervene. The Commission allowed the following parties to intervene: the Missouri Department of Natural Resources (DNR); the Missouri Industrial Energy Consumers (MIEC); the Sierra Club, Missouri Coalition for the Environment, Mid-Missouri Peaceworks, and the Association of Community Organizations for Reform Now (Sierra Club); the Missouri Energy Group (MEG); Noranda Aluminum; Aquila, Inc.; and the Missouri Joint Municipal Electrical Utility Commission (MJMEUC).

The IRP rule establishes a process by which the Commission gathers information to allow it to determine whether the electric utility's IRP filing complies with the requirements of the IRP rule. The first step in that process requires the Commission's Staff to review the utility's IRP

compliance filing and to file a report describing any deficiencies in the utility's compliance with the IRP rule. Staff filed its report, in which it identified several deficiencies in AmerenUE's IRP filing, on June 19, 2008. The IRP rule also allows the Office of the Public Counsel and any intervenors to file their own reports describing deficiencies in the utility's IRP filing. Public Counsel, DNR, the Sierra Club, and MIEC filed such reports on June 18 or 19, 2008.

The Partial Stipulation and Agreement

On August 12, 2008, AmerenUE, Staff, Public Counsel, DNR, MIEC, MEG, and the Sierra Club jointly filed a partial stipulation and agreement. That partial stipulation and agreement indicates the agreement of the signatory parties to take certain steps to resolve all the deficiencies identified by Staff and some of the deficiencies identified by the other parties. The partial stipulation and agreement, however, specifically provides that certain deficiencies identified by Public Counsel, DNR, and the Sierra Club remain unresolved.

Not all parties signed the partial stipulation and agreement. However, Commission Rule 4 CSR 240-2.115(2) allows the parties seven days in which to file an objection to the nonunanimous stipulation and agreement. If no party raises a timely objection, the Commission may treat the nonunanimous stipulation and agreement as unanimous.

Noranda filed a response to the nonunanimous stipulation and agreement on August 20, 2008. Noranda voiced concerns about remaining deficiencies in AmerenUE's IRP filing and specifically about AmerenUE's preferred resource plan. Noranda did not, however, object to the nonunanimous partial stipulation and agreement. No other party filed a response or objection to the nonunanimous partial stipulation and agreement. Therefore, the Commission will treat the partial stipulation and agreement as unanimous, and will accept it as a resolution of the deficiencies identified in that document.

The Remaining Deficiencies

On September 12, 2008, AmerenUE filed a detailed response to the alleged deficiencies that were not resolved by the partial stipulation and agreement. On the same date, Staff, Public Counsel, and Noranda filed responses to the deficiencies identified by other parties. The filing of those responses is the last procedural step mandated by the Commission's IRP rule. Thereafter, Commission Rule 4 CSR 240-22.080(9) states: "[t]he commission will issue an order which indicates on what items, if any, a hearing will be held and which establishes a procedural schedule." The first question the Commission must then

resolve is whether a hearing should be held regarding any of the alleged deficiencies.

Public Counsel, DNR, Noranda, and the Sierra Club, the entities that allege unresolved deficiencies, urge the Commission to schedule a hearing to take factual evidence regarding those deficiencies. AmerenUE denies any facts are in dispute and contends no hearing is needed. To address the question of whether an evidentiary hearing should be held, as well as to consider the partial stipulation and agreement and the remaining deficiencies, the Commission ordered the parties to appear for an on-the-record conference. That conference was held on October 7, 2008.

After considering the written arguments of the parties, as well as the oral argument and testimony offered at the on-the-record presentation, the Commission concludes this is not a contested case and no evidentiary hearing is needed to resolve the remaining disagreements regarding AmerenUE's IRP filing.

Section 536.010(4), RSMo (Supp. 2008) defines "contested case" as meaning "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Chapter 536 of the Missouri statutes, which establishes administrative procedures for this state, does not determine whether a hearing is required in a particular case. Rather, that determination must be based on the controlling substantive law.¹ The substantive law that requires a hearing may be "any statute or ordinance or any state or federal constitutional provision."²

The integrated resource planning process at issue in this case is entirely a creation of the Commission's IRP rule. Therefore, for this case, the controlling substantive law is the Commission's IRP rule. The applicable section of that rule, 4 CSR 240-22,080(9), gives the Commission discretion to decide whether to hold a hearing regarding any alleged deficiencies upon which the parties are unable to reach agreement.

The Commission's intent to retain discretion about holding a hearing when it promulgated the rule is clearly established in the Order of Rulemaking by which the IRP Rule was created. In rejecting Public Counsel's recommendation that the proposed rule be modified to require the Commission to convene a hearing whenever a party requests a

¹ *Wooldridge v. Greene County*, 198 S.W.3d 676, 683 (Mo. App. S.D. 2006).

² *Cade v. State*, 990 S.W.2d 32, 36 (Mo. App. W.D. 1999).

hearing, the Commission said: "The commission believes that it should retain the discretion not to schedule a hearing when it believes a hearing is not warranted."³

Of course, the fact that the controlling regulation does not require a hearing does not eliminate the need for a hearing if some other constitutional right, such as the right to due process, would require a hearing before "legal rights, duties or privileges of specific parties" can be determined. However, when an agency action is merely a general fact-finding investigation and the agency proceeding does not adjudicate or make binding determinations; there is no due process right to a hearing.⁴

The Commission will not make any binding adjudications in this case. The rule emphatically indicates that in finding compliance with the requirements of the rule, the Commission is not preapproving the utility's "resource plans, resource acquisition strategies or investment decisions."⁵ Instead, as the Commission indicated in its Order of Rulemaking, "the focus of the rules should appropriately be on the planning process itself rather than on the particular plans or decisions that result from the process."⁶ Therefore, this order will not determine the legal rights, duties, or privileges of any specific party and no due process rights are implicated.

The parties who advocate for an evidentiary hearing point to a provision of the rule that requires the Commission to "issue an order which contains findings that the electric utility's filing pursuant to this rule either does or does not demonstrate compliance with the requirements of this chapter"⁷ They contend that any findings of fact the Commission makes must be supported by competent and substantial evidence and the only way to obtain competent and substantial evidence is by holding an evidentiary hearing.

However, Missouri's administrative procedure law requires an agency to make formal findings of fact only in a contested case.⁸ Since this is not a contested case, the requirement to make findings of fact does not apply and does not create the need to conduct a hearing. Having found that the Commission has the discretion to conduct or not

³ Missouri Register, Vol. 18, No. 1, Page 94 (January 4, 1993).

⁴ *Vacca v. Admin. Law Judge Review Committee*, 945 S.W.2d 50 (1997).

⁵ Commission Rule 4 CSR 240-22.010(1).

⁶ Missouri Register, Vol. 18, No. 1, Page 91 (January 4, 1993).

⁷ Commission Rule 4 CSR 240-22.080(13).

⁸ Section 536.090, RSMo (2000).

conduct a hearing, the Commission must decide whether a hearing is appropriate in the circumstances of this case.

The remaining issues before the Commission are not based on any factual disputes. AmerenUE's IRP filing is what it is, and the parties who allege portions of that filing are deficient compare particular portions of the filing to the requirements of the rule and claim the requirements of the rule have not been satisfied. On the other side, AmerenUE contends the requirements of the rule have been satisfied. The Commission can examine and compare the IRP filing and requirements of the rule based on the extensive arguments already submitted by the parties. There is no need for additional testimony that could only attempt to further explain what the Commission can already read for itself.

The Particular Deficiencies

4 CSR 240-22.050(4)

This section of the Demand-Side Resources provisions of the IRP regulation simply requires AmerenUE to "estimate the technical potential of each end-use measure that passes the screening test." No party contends that AmerenUE has failed to meet that requirement. Instead, the deficiency alleged by both DNR and the Sierra Club goes beyond the requirements of the regulation, and is based on the stipulation and agreement by which alleged deficiencies in AmerenUE's 2005 IRP filing were resolved.

That stipulation and agreement required AmerenUE to prepare an estimate of achievable potential for multiple portfolios of programs where at least one portfolio represents a very aggressive approach to encouraging participation in demand-side management programs. DNR and the Sierra Club, supported by Public Counsel, contend AmerenUE's "aggressive" approach is not aggressive enough compared to demand-side efforts that are being made in other states. The remedy suggested by DNR is that the Commission direct AmerenUE to model a more aggressive approach in its next IRP filing.

AmerenUE contends it has already modeled a very aggressive approach in this IRP filing, however, the Commission agrees that demand-side management is vitally important and may be effective enough to reduce the need for development of costly supply-side alternatives. Therefore, the Commission directs AmerenUE to model an even more aggressive approach to encourage participation in demand-side management programs in its next IRP filing.

4 CSR 240-22.030(7)

This section of the Load Analysis and Forecasting provisions of the Commission's IRP rule requires AmerenUE to produce a high-growth forecast and a low-growth forecast to bracket its base-case load forecast. These forecasts are to be used as inputs to the strategic risk analysis required by another section of the regulation.

AmerenUE acknowledges it did not prepare a high-growth forecast to accompany its low-growth and base-case forecasts. That deficiency was also identified by Staff and in the partial stipulation and agreement, AmerenUE agreed to either provide a high-load growth forecast, or request a waiver of that requirement in its next IRP filing.

The Sierra Club contends AmerenUE's failure to develop a high-growth forecast and its use of its base-load forecast as an alternative would artificially maximize load growth in AmerenUE's risk analysis. The Sierra Club does not propose any remedy other than a suggestion that reliability be factored into low, base, and high scenarios in AmerenUE's next IRP filing.

AmerenUE has already agreed in the partial stipulation and agreement that it will deal with a high-growth forecast in its next IRP filing. Sierra Club has not demonstrated any need for an additional remedy and none will be required.

4 CSR 240-22.040(1)(K)

This section of the Supply-Side Resource Analysis provisions of the IRP rule requires AmerenUE to evaluate the environmental impacts of the various supply-side resource options. The Sierra Club alleges this portion of the IRP filing is deficient because it fails to evaluate the environmental impacts associated with the release of radioactive tritium and noble gases (krypton and xenon) from the Callaway I nuclear plant. The Sierra Club agrees with AmerenUE that the company is not currently required to take any action regarding the release of these materials. However, the Sierra Club speculates the NRC may at some time in the future require AmerenUE to take steps to process and isolate these materials, potentially at a significant cost.

The Sierra Club has identified an area of concern that could affect the cost of operating the Callaway Nuclear Plant as a supply-side resource in the future. The Commission directs AmerenUE to consider these potential costs in its next IRP filing.

4 CSR 240-22.070(5)

This section of the Risk Analysis and Strategy Selection provisions of the IRP rule requires AmerenUE to compute the cumulative probability distribution of the values of each performance measure

specified in another section of the rule. The Sierra Club points out that AmerenUE performs the required calculation for only one of the five specified performance measures. In reply, AmerenUE explained it did not perform the computations for the other performance measures because those analyses were not needed for purposes of this IRP filing. The Sierra Club does not offer any explanation of why these additional analyses should have been performed, but simply states "It is for the Commission to decide whether the requirements of the rule should be retrospectively waived."

The IRP rule does not require an electric utility to perform useless calculations simply to satisfy the letter of the regulation. AmerenUE adequately explained why it did not perform the additional calculations and no party has disputed that explanation. There is no deficiency with regard to this section of the regulation.

4 CSR 240-22.050(7)(A)1

This section of the Demand-Side Resource Analysis portion of the IRP rule requires AmerenUE to base its initial estimates of demand-side program load impacts on "the best available information from in-house research groups, national laboratories or other credible sources." Public Counsel contends AmerenUE failed to meet this requirement because the load impacts of demand-side management programs the company modeled in its integrated analysis should have been time-differentiated based on the specific load altering characteristics of each program. In response, AmerenUE denies that the analysis in its IRP filing is deficient, but indicates its willingness to further assess the benefit or detriment associated with introducing more detailed demand-side management impact information in its next IRP filing.

The Commission directs AmerenUE to further assess the benefit or detriment associated with introducing more detailed demand-side management impact information in its next IRP filing.

4 CSR 240-22.050(6)

This section of the Demand-Side Resource Analysis portion of the IRP rule requires AmerenUE to "develop a set of potential demand-side programs that are designed to deliver an appropriate selection of end-use measures to each market segment." Public Counsel contends AmerenUE's modeled assumptions about the impact of its Industrial Demand Response (IDR) programs are unrealistic in that they stay constant for the entire duration of the planning horizon, without taking into account possibly greater impacts over time as the market price of capacity rises and capacity and ancillary services markets develop.

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AmerenUE denies its response to this portion of the rule is deficient, but agrees that over time, the participation levels in the IDR program may change in the manner described by Public Counsel.

The Commission agrees with Public Counsel. The Commission directs AmerenUE to more realistically evaluate its IDR programs in its next IRP filing.

The Callaway 2 Allegations

4 CSR 240-22.010(2) (Public Counsel contends AmerenUE was unable to analyze demand-side and supply-side resources on an equivalent basis due to its lack of experience in implementing large-scale demand-side management programs.)

4 CSR 240-22.060(2) and 4 CSR 240-22.010(2)(A) and (2)(C) (Public Counsel contends AmerenUE should have done more to evaluate the financial metrics associated with construction of a Callaway 2 plant.)

4 CSR 240-22.060(3) and 4 CSR 240-22.010(2)(A) (Public Counsel contends AmerenUE should have looked at more alternatives for finding partners to share the cost of building a Callaway 2 plant.)

4 CSR 240-22.070(2) (Public Counsel contends AmerenUE should have identified its ability to recover the costs of Construction Work in Progress (CWIP) as a critical uncertain factor.)

4 CSR 240-22.040(8)(B) and (C) (Sierra Club contends AmerenUE has underestimated the overnight costs of constructing the US-EPR reactor it is considering building at Callaway 2.)

The remaining identified deficiencies all relate to concerns about planning for AmerenUE's possible construction of a second nuclear reactor at the Callaway Plant. The Commission will deal these alleged deficiencies together.

The parties asserting AmerenUE's IRP filing is deficient are concerned AmerenUE has not done sufficient planning to ensure its decision to build Callaway 2 is the best choice for the company and its ratepayers. In particular, they contend AmerenUE has not sufficiently analyzed the need to build a new 1600 MW base load plant, including the need to perform a retirement or life-extension analysis for the 800 MW Meramec coal-fired plant, which would be retired when the new nuclear plant comes on line. They are also concerned AmerenUE has not sufficiently analyzed all financing alternatives in its rush to have Missouri's anti-CWIP statute overturned by the legislature.

AmerenUE concedes further study is needed before it makes a final decision on whether to build Callaway 2. To that end, it has committed to completing and filing its next IRP at least six months before

making a final decision to build, or not build the new nuclear plant. The company also promises to informally cooperate with all interested parties in the months leading up to the filing of the formal IRP plan. However, as illustrated by the fact that this case is still pending and hotly contested more than a year after AmerenUE filed its 2008 IRP, six months does not allow the Commission and the other parties a sufficient time to review and contest AmerenUE's next IRP filing.

Because of the uncertainty in the 2008 IRP's treatment of the decision whether to build Callaway 2, the Commission finds that AmerenUE's 2008 IRP does not demonstrate compliance with the requirements of the Commission's IRP rule. Furthermore, for the same reason, the Commission finds that AmerenUE's resource acquisition strategy does not meet the requirements stated in 4 CSR 240-22.010(2)(A)–(C).

Despite the deficiencies in AmerenUE's 2008 IRP filing, it would be a waste of resources to require AmerenUE to look backward to revise that filing. Instead, the Commission will direct AmerenUE and the other interested parties to look forward to AmerenUE's next IRP filing. The rule requires AmerenUE to make that next IRP filing in April 2011. In its application to the Nuclear Regulatory Commission, AmerenUE indicated if it decides to proceed with Callaway 2, it would like to start construction in April 2012. The Commission will order AmerenUE to file its next IRP in April 2010.

THE COMMISSION ORDERS THAT:

1. The partial stipulation and agreement filed on August 12, 2008, is accepted by the Commission as a resolution of the deficiencies identified in that document. The signatory parties are ordered to comply with the terms of that partial stipulation and agreement.
2. Union Electric Company, d/b/a AmerenUE, shall file its next Integrated Resource Plan no later than April 1, 2010.
3. This order shall become effective on March 1, 2009.

Murray, Davis, and Jarrett, CC., concur;
Clayton, Chm., with separate dissenting
opinion to follow, and Gunn, C., dissent.

Woodruff, Deputy Chief Regulatory Law Judge

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NOTE: The partial stipulation and agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: Another order in this case can be found at page 464.

DISSENTING OPINION OF CHAIRMAN ROBERT M. CLAYTON III
AND COMMISSIONER KEVIN D. GUNN

These Commissioners dissent to the Final Order Regarding AmerenUE's 2008 Integrated Resource Plan (IRP). In that order, the majority makes numerous findings including the fact that AmerenUE's plan does not demonstrate compliance with the Commission's IRP rule. In spite of this finding, the majority refuses to move forward to evidentiary hearing to make a complete record of the deficiencies or order AmerenUE to correct those deficiencies. Instead the majority declines to even engage in any discussion of these issues until 2010.

In the coming years, AmerenUE must make significant decisions regarding demand-side planning and the potential construction of a Callaway 2 nuclear plant. The purpose of the IRP rule is to ensure the company carefully considers those decisions well in advance. AmerenUE should be planning for those decisions now, not waiting until it is time to file its next IRP in 2010. All of the parties in this case spent countless hours reviewing AmerenUE's IRP filing and, along with the majority, found that filing to be deficient. This deferral of compliance sends the wrong message to not only the parties interested in these issues in this case, but in all current and future IRP dockets. These Commissioners would require AmerenUE to correct the deficiencies in its 2008 IRP now, rather than allow the company until its next IRP filing to get it right.

For the foregoing reasons, these Commissioners respectfully dissent.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs
to Increase Its Annual Revenues for Electric Service***

Case No. ER-2008-0318
Decided February 19, 2009

Evidence, Practice and Procedure §27. The Commission refused to rehear a portion of

*This case was appealed to the Missouri court of Appeals (SD) and affirmed. See 356 SW 3d 293. (Mo. App. S.D. 2011)

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its report and order to modify the approved fuel adjustment clause to allow AmerenUE to recoup a portion of the revenue it expects to lose because of decreased sales of electricity to Noranda's aluminum smelting plant due to damage to the plant resulting from a severe ice storm.

ORDER DENYING AMERENUE'S APPLICATION FOR REHEARING

On January 27, 2009, the Commission issued a Report and Order regarding Union Electric Company d/b/a AmerenUE's tariffs to increase its rates for electric service. That Report and Order became effective on February 6. On February 5, AmerenUE filed an application for rehearing asking the Commission to substantially modify the fuel adjustment clause the Commission approved in the Report and Order.

AmerenUE asks the Commission to revise the approved fuel adjustment clause to allow the company to retain a portion of its off-system sales revenue that would otherwise be passed through the fuel adjustment clause. That would allow AmerenUE to recoup the revenue it expects to lose because of decreased sales of electricity to Noranda's aluminum smelting plant due to damage to the plant resulting from the recent severe ice storm.

The Commission established February 10 as the deadline for the filing of responses to AmerenUE's application. Noranda Aluminum, Inc., the Office of the Public Counsel, the Missouri Industrial Energy Consumers (MIEC), and the Staff of the Commission filed responses opposing AmerenUE's application.

If the Commission were to grant AmerenUE's application for rehearing it would have to set aside the approved stipulation and agreement regarding the fuel adjustment clause, reopen the record to take evidence on the appropriateness of the proposed change, and make a decision before the March 1, 2009 operation of law date. Such action is obviously impossible.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." AmerenUE has not shown sufficient reason to rehear the Report and Order. The Commission will deny AmerenUE's application for rehearing.

THE COMMISSION ORDERS THAT:

1. Union Electric Company d/b/a AmerenUE's Application for Rehearing is denied.
2. This order shall become effective immediately upon issuance.

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Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: Other orders in this case can be found at pages 295, 297, 306, and 443.

**In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs
to Increase Its Annual Revenues for Electric Service***

*Case No. ER-2008-0318
Decided: February 19, 2009*

Evidence, Practice and Procedure §27. The Commission denied applications for rehearing that restated positions the Commission previously rejected in its report and order.

Evidence, Practice and Procedure §27. The Commission does not have authority to stay the effect of its orders while judicial review is obtained.

**ORDER DENYING APPLICATIONS FOR REHEARING FILED BY
NORANDA, PUBLIC COUNSEL, AND AARP, AND DENYING
NORANDA'S MOTION FOR STAY**

On January 27, 2009, the Commission issued a Report and Order regarding Union Electric Company d/b/a AmerenUE's tariffs to increase its rates for electric service. That Report and Order became effective on February 6. On February 5, Noranda Aluminum, Inc., the Office of the Public Counsel, and AARP filed applications for rehearing.

The Commission established February 10 as the deadline for the filing of responses to the applications for rehearing. AmerenUE filed a response opposing the applications for rehearing.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." The applications for rehearing merely restate positions the Commission has previously rejected in its Report and Order. In the judgment of the Commission, Noranda, Public Counsel, and AARP have not shown sufficient reason to rehear the Report and Order. The Commission will deny their applications for rehearing.

*This case was appealed to the Missouri court of Appeals (SD) and affirmed. See 356 SW 3d 293. (Mo. App. S.D. 2011)

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Along with its application for rehearing, Noranda filed a motion asking the Commission to stay the effectiveness of its Report and Order while judicial review proceeds. Section 386.500.3, RSMo (2000), gives the Commission authority to stay the effectiveness of its orders while an application for rehearing is pending.¹ Since the Commission is denying Noranda's application for rehearing, there is no reason to stay the effectiveness of the Commission's Report and Order. The Commission will deny Noranda's motion for stay.

THE COMMISSION ORDERS THAT:

1. Noranda Aluminum, Inc.'s Application for Rehearing is denied.
2. AARP's Application for Rehearing is denied.
3. The Office of the Public Counsel's Application for Rehearing is denied.
4. Noranda Aluminum, Inc's Motion for Stay of Commission Order is denied.
5. This order shall become effective immediately upon issuance.

Murray, C., concurs.
Davis and Jarrett, CC., concur, with
separate concurring opinions attached.
Clayton, Chm., and Gunn, C., dissent.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: Other orders in this case can be found at pages 295, 297, 306, and 441.

¹ The statute does not expressly give the Commission authority to stay the effect of its orders while judicial review is obtained. Indeed, it is difficult to see how judicial review of an order stayed by the Commission could proceed under those circumstances, since a reviewing court does not have jurisdiction until presented with a final Commission order, and a stayed order, by definition, would not be final. If Noranda wants to stay the effectiveness of the Commission's Report and Order during the judicial review process, it must present its arguments to the circuit court under the procedure established in Section 386.520.1, RSMo 2000.

**CONCURRENCE OF COMMISSIONER JEFF DAVIS IN THE
COMMISSION'S ORDER DENYING APPLICATIONS FOR
REHEARING FILED BY NORANDA, PUBLIC COUNSEL, AND AARP
AND DENYING NORANDA'S MOTION FOR STAY**

I respectfully concur fully with my colleagues in the reasoning and decision to deny the motions for rehearing filed by Noranda, the Office of Public Counsel and AARP as well as the motion to stay filed by Noranda. With regard to the points raised by these parties and the minority writing in this case I wish to provide greater detail regarding the majority's decision in regard to the following specific issues:

OVERVIEW OF THE CASE:

The final true-up reconciliation filed by the Missouri Public Service Commission staff states unequivocally that, at a minimum, AmerenUE is entitled to recover approximately \$66 million.

The cornerstone of the PSC Staff's case is Stephen Hill's return on equity recommendation of 9.5%. The record demonstrates that, if adopted, Mr. Hill's would be the lowest commission-authorized return on equity in the country for any "vertically-integrated" utility. Hill's testimony is suspect for a myriad of reasons and there is certainly no evidence in the record to support the contention that AmerenUE merits the lowest return on equity of any utility in its class.

There is a plausible explanation for the PSC Staff's position in this case. The PSC staff had the advantage of reviewing AmerenUE's case and testimony before filing it's testimony in this case. Dr. Roger Morin, Ameren UE's expert witness for cost of capital, proffered testimony of a 10.9% return on equity for AmerenUE. If you average Mr. Hill's recommended return on equity with that of Dr. Roger Morin, the result is 10.2%. It is my impression, based on the evidence in this case as well as knowledge and experience, that the PSC Staff never intended for this Commission to adopt Mr. Hill's original position. Rather, they took that position to afford themselves maximum negotiating room with AmerenUE in attempting to settle the rate case.

The Office of Public Counsel (OPC), Missouri Industrial Energy Consumers (MIEC) and the Missouri Energy Group (MEG) all supported AmerenUE receiving the same return on equity awarded by this Commission in the previous AmerenUE ratecase - 10.2%. If the PSC Staff's position is adjusted to that same 10.2% recommendation, the result would increase AmerenUE's rates by another \$33.4 million pursuant to the true-up reconciliation filed in this case by the PSC Staff

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on January 5, 2009. This one adjustment pushes staff's overall position to approximately \$100 million.

Once the return on equity difference is addressed, OPC differs from the PSC Staff on only one other issue if we assume that OPC concurred with all of the staff issues on which OPC did not file testimony. That issue, depreciation on the Callaway nuclear power plant, is worth approximately \$7.2 million. Thus, if the Commission adopted the 10.2% return on equity position referenced earlier in this order and found for OPC on every other issue they supported in this case, AmerenUE would still be entitled to approximately \$92 million in new revenue from the ratepayers in this case.

Now, consider that AmerenUE originally requested approximately \$251 million in new revenues when it filed this case on April 4, 2008. The company has settled several issues and since reduced that request to approximately \$188 million as reflected in the PSC Staff's true-up reconciliation. Thus, the true difference between AmerenUE and the PSC Staff's position in this case is approximately \$88 million. The difference between AmerenUE and the OPC appears to be approximately \$95.2 million due to OPC's position on depreciation.

The decision to award AmerenUE slightly more than two-thirds of the disputed \$88 - \$95 million is a significant one in that every additional \$20 million of revenue will cost the average consumer another one percent on their bill at a time when customers and businesses can least afford it.

How can the Commission do this to consumers? The Commission is required to do so for two reasons: (1) the law requires us to set just and reasonable rates that afford the utility the opportunity to earn a return on its investment comparable to that of other similar endeavors; and (2) this is the decision that the facts in the case compelled a majority of the Commission to write. These points are interwoven in the following issues:

Return on Equity & Fuel Adjustment:

AmerenUE is a vertically-integrated utility. This means that it owns and operates electricity-generating plants, transmission lines as well as a distribution system. The national average for return on equity in 2008 was reported as being 10.61%. It should be further noted the Illinois Commerce Concurrence awarded AmerenUE's Illinois affiliates a 10.65% return on equity.

Our decisions on the issue of return on equity should not unthinkingly mirror those numbers, but a decision in that range is a lot

more grounded in reality than the one recommended by some of the parties and the minority in this case. The minority would have us adopt a recommendation approximately 40 basis points below the national average and 45 basis points below that awarded by the Illinois Commerce Commission. Further, they would deny AmerenUE millions of dollars in fuel costs, which would effectively deny AmerenUE the opportunity to even earn its allowed return on equity.

What does this mean for Missouri? A difference of 40 or 45 basis points from the national average could amount to millions of dollars and be a serious disincentive to utility capital investment in Missouri. This statement should not be construed to mean that AmerenUE would fail to provide "safe and adequate" service. It means the minority of the Commission could unwittingly be incenting AmerenUE's parent corporation to invest discretionary capital in Illinois and elsewhere because of the low return on equity they would award AmerenUE.

The evidence in this case demonstrates that AmerenUE's expert, Dr. Morin, is a preeminent expert in the field and very credible. That being said, he did appear to be "massaging" his numbers to stick to his 10.9% recommendation in this case. Dr. Morin's two most compelling points of his testimony were: (1) any DCF calculation should be based on quarterly dividends and (2) when comparing proxy groups, two grades or notches is a significant difference requiring an adder. The Commission needs to study Morin's argument on "flotation costs" either in the context of a special docket to look at return on equity or in the context of a rate case where a utility has actually issued stock during the historic test year.

Mike Gorman is also a solid, reliable expert for return on equity testimony. His strength is his ability to distill his testimony down to points that commissioners can easily understand. Like Dr. Morin, Gorman also gave the impression that he was trying to "massage" the numbers toward his 10.2% recommendation.

Dr. Morin and Mike Gorman were the most credible experts on the issue in this case. The Commission's return on equity decision rightly fell between their two recommendations. In the end, the analysis of the facts tilted more towards Dr. Morin's end of the spectrum. Gorman's failure to use a quarterly DCF analysis coupled with the strained reasoning of his risk-premium analysis lead this commission to a much higher result. In conclusion, the majority's risk-premium discussion says everything that needs to be said on that issue with regard to the Commission's specific finding of a 10.76% return on equity.

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Although not part of this case, two subsequent events work to underscore the rightness of the majority's decision in this case and undermine the minority's position that AmerenUE is seemingly without much risk. The first is the ice storm of January 26, 2009, and the second is the widely-reported news story that AmerenUE has slashed its dividend by approximately 39% or approximately \$1.00 per share.

Excluding storm recovery costs that could cost an untold amount of money, AmerenUE estimated the January 26, 2009, storm could cost the company \$70 million due to the loss of electric sales to Noranda. Ameren subsequently cut dividends by approximately \$1.00 per share. One can only speculate what the dividend cut would have been had the commission minority had one more vote and reduced AmerenUE's proposed rate increase by at least another \$25 million and denied half of their prudently incurred fuel costs, but one thing ought to be clear – if AmerenUE was rolling in money like the minority and some of the parties claim, they wouldn't have cut their dividends by \$1.00 per share.

The minority's decision to support a 10.2% return on equity with marginal or no recovery of fuel expenses approaches the point where they would impair the company's ability to attract capital on a going forward basis. A low return on equity is not fatal to Ameren's ability to attract capital in the market, but the inability to earn that low return on equity might be in this context. By coupling a low return on equity with no fuel adjustment clause or a marginal fuel adjustment clause, the minority is effectively denying AmerenUE even the basic opportunity to earn their allowed return on equity. Why would any halfway intelligent person buy Ameren equity for the opportunity to earn 10.2% when a historical review of their recent inability to earn that amount and AmerenCILCO, AmerenUE's Illinois affiliate, recently issued senior secured notes at 8.875%?

In conclusion, the State of Missouri is not an island. The minority's overall recommendation in this case is confiscatory at best and "stealing by design" at its worst. Regulation of this nature, if allowed to go unchecked, could work to unwittingly deny AmerenUE's attempt to build a new nuclear plant even before it gets off the ground.

CAPITAL STRUCTURE ARGUMENTS:

The majority's decision on this issue is correct. Mr. O'Bryan's testimony on the issue was credible and Mr. Hill's testimony was not. O'Bryan's testimony is further supported by the fact that Mike Gorman submitted direct testimony on the issue of capital structure. Despite the fact that he submitted rebuttal, surrebuttal and live testimony in this case,

one would think that Mr. Gorman, if he disagreed with Mr. O'Bryan's testimony, would have stated as much since the issue was valued at approximately \$7 million. Gorman is an accomplished witness in many of these areas and his silence on a \$7 million issue that was necessary to compute the company's overall rate of return can certainly be construed as his acceptance of Mr. O'Bryan's position.

NORANDA'S FINANCIAL SITUATION:

Obviously, Noranda and many other industrial consumers are struggling for their very survival. Noranda, to its credit, offered its own class cost-of-service study in this case, but then signed a stipulation settling the rate design issue that was agreed to by all of the parties to this case, except for the PSC Staff.

In seeking to shift a greater portion of costs to the other classes of ratepayers served by AmerenUE, it would have been helpful to this Commissioner and possibly other Commissioners, if Noranda had presented information, including but not limited to the following issues:

- (1) whether or not the operation of an aluminum smelting operation in Missouri could help attract other manufacturing jobs to Missouri and whether the absence of such facility could be detrimental to retaining and attracting jobs to Missouri and the area;
- (2) whether maintaining the operation of aluminum smelters is important to the nation's manufacturing independence;
- (3) the rates charged to other aluminum smelters in the United States as well as globally in comparison to those charged by AmerenUE to Noranda; and
- (4) whether Noranda ships aluminum to any other Missouri manufacturers, particularly automobile manufacturers or any other industry thought to be struggling, who will in turn have to charge higher prices for the commodities they sell.

In summary, Noranda's facts concerning job loss and the global price of aluminum are both compelling and concerning; however, I just did not feel Noranda made a compelling enough case here to justify any further rate freeze or reduction when the Commission has decided the revenue requirement should be increased. Like AmerenUE's motion for rehearing, Noranda's motion for a stay flies in the face of a stipulation and agreement signed by counsel on behalf of Noranda that certainly gives the appearance of acknowledging a rate increase between \$80 million and \$160 million is in order.

Union Job Training Issue:

Although not raised in the motions for rehearing, it is worth noting that the majority discussed certain union complaints beginning on page 109 of the Commission's order. In response to questions from this Commissioner, AmerenUE responded with Exhibit #78 as noted in footnote 343 of the opinion. The Commission based its decision to award \$1.77 million to AmerenUE on the information provided by the company in that footnote and this Commissioner expects AmerenUE to honor its pleading as well as the intent of the Commission majority by using the money as outlined in Exhibit #78 and amended by the Commission. If AmerenUE does not proceed to comply with the report and order in the prescribed manner for this issue, AmerenUE or the affected unions should notify this Commission immediately so that further action may be taken.

Conclusion:

These are tough issues and tough times. The lack of trust demonstrated by the parties is certainly understandable given the history and the circumstances. This Commissioner appreciates how the parties were able to put aside some of their philosophical differences and come together to settle many of the disputed issues. Such cooperation, combined with a certain degree of imagination, may be necessary if we're going to successfully navigate through the current economic climate and achieve long-term results that benefit all Missourians.

**CONCURRING OPINION OF COMMISSIONER TERRY M. JARRETT
TO THE ORDER DENYING APPLICATIONS FOR REHEARING FILED
BY NORANDA, PUBLIC COUNSEL, AND AARP,
AND DENYING NORANDA'S MOTION FOR STAY**

HOT WEATHER SAFETY PROGRAM

Since it is clear that not only Chairman Clayton, but also Commissioner Gunn¹ and AARP², through its counsel, believe that I do not support a Hot Weather Safety Program, I am compelled to clarify my position with regard to this type of program.

My vote for the Report and Order (which ultimately declined to implement the Hot Weather Safety Program) in this case, and my vote opposing rehearing on this issue, does not mean that I oppose this type of important program. To the contrary; during Commission case

¹ See Report and Order EO-2008-0318, January 27, 2009, Dissenting Opinion of Commissioner Kevin D. Gunn and Chairman Robert M. Clayton III, January 27, 2009.

² See AARP's Application for Rehearing, February 5, 2009.

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discussion in this matter in public Agenda meetings I made clear that I did support the pilot Hot Weather Safety Program provided that the program would include a tracking mechanism, allowing for accountability and verification of the program's results.

I thoroughly appreciate the need to consider options for protecting low-income seniors, including testing the veracity of a program designed to encourage use of air conditioning during Missouri's hottest days, with back end reporting of the results.

Report and Orders of the Commission are voted on in their entirety, and are not voted on by individual issue. In this case, I was prepared to vote in favor of the Hot Weather Safety Program but I was not able to attract the votes necessary to include it in the Report and Order.³ It does however appear that AARP may soon have a chance to reintroduce a Hot Weather Safety Pilot Program to the Commission. The Southeast Missourian reports today, February 19, 2009, that top officials of Ameren Corp., AmerenUE's parent company, in a conference call with investment analysts have indicated that a rate increase will be sought. These officials however could not say when the rate request would be requested.⁴ As such, if and when a rate increase is requested, I would expect that AARP would likely return to the Commission with another proposal, which would give the Commission an opportunity to revisit this important matter.

In all respects I reaffirm my support for the Report and Order in this case, as well as my vote to deny all Applications for Rehearing and denial of the Motion for Stay in this case.

³ Commissioner Davis also publically voiced his support for a Hot Weather Safety Program.

⁴ <http://semissourian.com/article/20090219/NEWS01/702199929>

CHARTER FIBERLINK-MISSOURI, LLC

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Petition of Charter Fiberlink-Missouri, LLC for Arbitration of Interconnection Rates, Terms, Conditions, And Related Arrangements with the CenturyTel of Missouri, LLC Pursuant to 47 U.S.C. § 252(b)

*Case No. TO-2009-0037
Decided February 25, 2009*

Evidence, Practice and Procedure §28. Commission Rule 4 CSR 240-36.040(24) allows the Commission to adopt, modify, or reject an arbitrator's final report, in whole or in part.

Telecommunications §4. Section 252 of the Telecommunications Act of 1996 authorizes the Commission to arbitrate unresolved issues in the negotiation of an interconnection agreement.

ORDER ADOPTING FINAL ARBITRATOR'S REPORT

On July 31, 2008, Charter Fiberlink-Missouri, LLC (hereafter "Charter") filed a petition for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. The petition asks the Commission to arbitrate unresolved issues in the negotiation of an interconnection agreement between Charter and CenturyTel of Missouri, LLC (hereafter "CenturyTel").

The Arbitrator conducted a hearing on October 27–28, 2008, and issued a Final Arbitrator's Report on January 6, 2009. At the parties' request, the Commission held an oral argument on February 5, 2009.

Commission Rule 4 CSR 240-36.040(24) allows the Commission to adopt, modify, or reject the arbitrator's final report, in whole or in part. As permitted by this rule, the Commission adopts the arbitrator's final report in whole.

THE COMMISSION ORDERS THAT:

1. The Final Arbitrator's Report issued on January 6, 2009, is adopted in whole.
2. The parties shall file an interconnection agreement that conforms to this order no later than March 4, 2009.
3. This order shall become effective on March 6, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

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Pridgin, Senior Regulatory Law Judge

NOTE: The Final Arbitrator's Report in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of WPC Sewer Company's Small Company Rate Increase

*File No. SR-2008-0388
Decided March 4, 2009*

Evidence, Practice and Procedure §8. In a small sewer rate case, the utility and Staff arrived at a disposition agreement. Public Counsel objected. After suspending the utility's tariff due to Public Counsel's objection, the Commission ultimately approved a unanimous stipulation and agreement among Public Counsel, Staff, and the utility.

ORDER APPROVING UNANIMOUS DISPOSITION AGREEMENT

Syllabus: This order approves the parties' Unanimous Disposition Agreement.

Procedural History

On June 9, 2008, WPC Sewer Company (hereafter "WPC Sewer") initiated a small company rate case. WPC Sewer requested a rate increase intended to generate an annual increase of \$19,207.56 in sewer system operating revenues.

On November 6, 2008, the Staff of the Commission (hereafter "Staff") and WPC Sewer entered into an Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request. Staff and WPC Sewer agreed that WPC Sewer should receive an annual rate increase of \$5,357. On that same day, WPC Sewer also filed a tariff sheet to implement that rate increase, which was to become effective December 22, 2008. The Commission denominated that sheet Tariff No. YS-2009-0334.

On December 9, 2008, the Office of the Public Counsel (hereafter "OPC") requested a local public hearing regarding the agreement between Staff and WPC Sewer. Therefore, the Commission suspended the tariff sheet until January 21, 2009. The local public hearing was held on January 5, 2009.

On January 21, 2009, OPC requested an evidentiary hearing. On January 23, 2009, Staff recommended a new revenue requirement. Also on the same day, the Commission further suspended WPC's tariff

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sheet until May 9, 2009. After further negotiation, WPC Sewer, Staff and OPC arrived at a Unanimous Stipulation and Agreement, which was filed on February 25, 2009.

Unanimous Disposition Agreement

The parties agree that WPC Sewer needs an annualized operating revenue increase of \$927 to recover its cost of service. WPC Sewer has approximately 65 customers; therefore, approximately \$14.26 of additional annual revenue is needed from each customer. As is shown in Attachment E to the Agreement, WPC Sewer would be able to increase its rates as follows:

The current monthly customer charge is \$23.88. The proposed monthly charge is \$25.04. The increase in a customer's bill would be \$1.15, which would be a 4.83% increase.

Upon review of the Unanimous Disposition Agreement and the proposed rates, the Commission finds the proposed rates to be just and reasonable. The Commission also finds the depreciation rates proposed by Staff, attached to the Agreement as Attachment F, to be just and reasonable and will direct WPC Sewer to implement them.

THE COMMISSION ORDERS THAT:

1. The following tariff sheet filed by WPC Sewer Company, which the Commission denominated Tariff No. YS-2009-0334, is rejected:

P.S.C.MO No. 1

3rd Revised Sheet No. 4, Canceling 2nd Revised Sheet No. 4

2. The Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request entered into among the Staff of the Commission, the Office of the Public Counsel and WPC Sewer Company is approved.

3. The parties to this matter are directed to comply with the terms of the Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request.

4. WPC Sewer Company shall implement the depreciation rates attached to the Agreement Regarding Disposition of Small Water Company Revenue Increase Request.

5. WPC Sewer Company is authorized to file a tariff sheet identical to the example tariff sheet listed as Attachment A to the Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request.

6. This order shall become effective on March 14, 2009.

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Clayton, Chm., concurs.
Murray and Gunn, CC., concur, with
separate concurring opinion attached.
Davis, C., dissents.
Jarrett, C., dissents, with separate
dissenting opinion to follow.

Pridgin, Senior Regulatory Law Judge

NOTE: The Unanimous Disposition Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

CONCURRING OPINION OF COMMISSIONERS
CONNIE MURRAY & KEVIN GUNN

Although we concur with the majority, we write separately to express our concern with the small company rate case process in this instance.

The minority expressed concern in regard to their perceived undervaluation of various items within the cost of service calculations used to arrive at the Unanimous Disposition Agreement and issues regarding the small company rate case process in general. To address this concern, the minority sought to have an on-the-record hearing.

We appreciate the minorities' concern and desire to have a hearing; however, to move forward with an on-the-record hearing at this time, the commission would have to ignore the parties' desire to resolve this case with the Unanimous Disposition Agreement. Further, a hearing would require the company to expend already limited financial resources to retain counsel, an action the small company rate case process is designed to avoid.

The parties to this case have arrived at a Unanimous Disposition Agreement and the commission was correct in accepting it. However, this case has again brought to light the difficult issues surrounding the regulation of small water and sewer companies. We urge the commission to immediately create a working docket to allow any party interested in the small company rate case process to come to the table and find workable alternatives to the traditional methods of regulating and financing small water and sewer companies.

For the foregoing reasons, we concur in the Report and Order.

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT

In this case, the majority has not only reached the wrong result, they have ignored the premise of rate regulation, which rests on the concepts of fairness and equity and avoidance of unreasonable discrimination. When this Commission adopted new rules regarding small utility rate case procedures¹ this basic and fundamental premise did not evaporate.

In *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944), the United States Supreme Court made clear that the controlling test in determining "just and reasonable" rates is the end result² and not the method of reaching that result. Unfortunately, here the majority has focused not on the end result being just and reasonable rates, but rather how that result was reached – by a *unanimous* stipulation and agreement of the parties. As regulators, we must not lose sight of our ultimate responsibility, which is determining just and reasonable rates that are in the public interest, while also ensuring safe and reliable service. Only the Commissioners make that final determination, which is why a *unanimous* stipulation presented to the Commission is nothing more than a "proposed resolution."³ A stipulation is only a suggestion as to the disposition of some or all of the issues pertaining to the utility's revenue increase request that the Commission considers in determining whether the result is just and reasonable rates. The majority decision rests on the premise that the *unanimity* of the stipulation thereby makes the result just and reasonable. While it is entirely possible that a unanimous stipulation *could* be found to produce just and reasonable rates, in this case, it did not.

At the heart of this process are the newly adopted rules set out at 4 CSR 240-3.050, Small Utility Rate Case Procedures.⁴ These procedures distort the traditional framework for the determination of rates, because the rule specifically requires that the utility omit the filing of tariff revisions at the onset of the case. Instead, the utility merely provides notice as to what rate increase is sought. Accordingly, the traditional file and suspend method is altered. This process creates a

¹ 4 CSR 240-3.050(1)-(25); and 4 CSR 240-3.330, regarding Sewer Utility Small Company Rate Increase Procedures.

² This case established the doctrine of the "end result." *The Regulation of Public Utilities, Theory and Practice*, 3rd Ed. Charles F. Phillips, Jr., pg. 181, 1993.

³ 4 CSR 240-3.050(10) (*emphasis added*).

⁴ See fn. 1.

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delay in the effective date of new rates, and appears to have been intended to allow unsophisticated small utilities the opportunity to interact with the Commission's staff for purposes of investigating the utility's rate increase request, allow the Public Counsel an opportunity to do the same, and provide for agreement or resolution at an early stage, in what could otherwise be a lengthy process.⁵

A utility's ability to determine what rate it chooses to file is an instrumental foundation for the balance of competing interests in a monopoly environment. After a utility makes its own determination of what rate is appropriate, the staff of the Commission, the Office of the Public Counsel, as well as other interested parties, have a chance to challenge the utility's rate, thus preserving a balance in the regulatory process. The small utility rate case procedure generally maintains this instrumental foundation. However, in my opinion, delaying the utility's tariff filing until after the utility requests a rate increase causes a shift in the balance of the parties' negotiating power.⁶ Generally, the size of these small utilities and the fact that they are not represented by legal counsel are two elements which further raise my concern.

Another element that alters this balance is that where the Commission staff and the utility may agree on the disposition of the matter, the Office of the Public Counsel, under 4 CSR 240-3.050(15), has the ability to leverage its authority by calling for a local public

⁵ Staff notes that the Letter provided by WPC Sewer Company requesting a rate increase was made pursuant to 4 CSR 240-3.330, and that the "Commission" notified WPC that this rule had been superseded by Rule 4 CSR 3.050, effective May 30, 2008, *Notice of Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request, by the Staff of the Missouri Public Service Commission, February 25, 2009*. This Commissioner, however, would note that this Commission never made any such notification in this matter, as is reflected in the electronic filing and information system ("EFIS"). This Commissioner also notes that rule 4 CSR 240-3.330 was not and has not been rescinded. Further, representations by the Staff of the Missouri Public Service Commission, purporting to be representations of this Commission inappropriately blur the separation of the Commission, the Commissioners and its staff in proceedings before the Commission. Such representations may also serve to confuse a small utility about the distinction between the Commission and its staff, which most certainly could lead to a diminution in the negotiating power of these parties in a rate increase matter if the utility believes that the staff's representations are those of the Commission.

⁶ By making a request for an increase, and then allowing the Commission's staff to essentially act in a role more akin to an assistant to the utility, runs the risk that the utility will not view a recommendation by the Commission's staff as an adversarial position, and further, that the utility may misunderstand that the recommendation of the Commission's staff, is not necessarily the recommendation of the Commission. All are risks which impact on negotiating power in this process.

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hearing, or even an evidentiary hearing, in a tactical manner which can disadvantage a small utility.⁷ The Office of the Public Counsel, regardless of its size or budget, still represents a formidable party opponent for a small utility seeking a rate increase, a fact that is not unnoticed by this Commissioner.

The Commission must be mindful that regulated utilities exchange a competitive marketplace in favor of a monopolistic existence in the market. As such, the Commission is not merely a spectator in the marketplace, but rather is a substitute for the marketplace. This exchange from competition to regulation does not dispose of this Commission's fundamental obligation in serving the public interest, and that the end result of the regulatory process includes just and reasonable rates.⁸ The Small Utility Rate Case Procedure⁹ should not eliminate this Commission's obligation; instead, it should preserve it. Additionally, this Commission must ensure that the utilities it regulates perform at levels that are in the public interest, regardless of their size.

In this particular case, the Commission's staff auditor indicated to the Commission that at least one number in the cost of service calculation was wrong and should be increased. This small, \$100.00 change, while appearing to be small is nearly a 10% difference in the overall revenue requirement for this utility. The majority glossed over this difference by instead pointing to the *unanimous* agreement as the rationale for the result. But clearly, a 10% difference demonstrates that the *unanimously* agreed rate may, after hearing, be found not just and reasonable. When a difference this significant exists, the public interest suggests that an evidentiary hearing is proper to explore, not only this issue, but any other differences that may exist.

⁷ The reasons for considering tools of "due process" as a tactical tool are the knowledge that there is added cost and expense associated with both the local public hearing as well as the evidentiary hearing. For these reasons I support modification, or even the overall elimination of the small utility rate case procedure. Additionally, this Commissioner has concerns that the rule as currently written, under 4 CSR 240-3.050(21) unwittingly appears to remove the public interest obligations of the Commissioners when exercising their regulatory responsibilities, by limiting the considerations for evidentiary hearings to "due process, the fairness to the participants in the matter and the utility's ratepayers."

⁸ See Section 393.130.1 RSMo Supp. 2008. "Every ... sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such ... sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. [...]" See also Section 386.310.1 RSMo (2000).

⁹ 4 CSR 240-3.050(1) – (25).

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Beyond the \$100.00 change, there is the matter of the compliance issue with Department of Natural Resources ("DNR") requirements. In 2007, DNR gave WPR until December 31, 2013, to take steps to become compliant with DNR standards. This compliance effort may include a need for capital improvements in WPR's sewer system, which the Commission's staff has indicated could exceed \$10,000, including engineering studies, as well as construction. The majority's answer to these DNR requirements is to have WPR come back for another rate case. Instead, the focus should be on the present situation and consideration of the financial damage that the approved rate may have on WPR's ability to receive financing for these improvements or to undertake them at all. Additionally, this Commission has within its power the ability to order reimbursement for construction work in progress in anticipation of the improvements that would be required by DNR. The Commission's Staff even acknowledged that a surcharge to pay for this type of required improvements would be appropriate, an issue that could have been developed at an evidentiary hearing.

Unfortunately, the majority ignored both the change in expenses, which are nearly 10%, as well as allowing construction work in progress ("CWIP") for funding the DNR required improvements. While the statements of the staff at a Commission Agenda session are not evidence, they are at least an indicator of facts that could be elicited at an evidentiary hearing. That is why I supported an evidentiary hearing in this case, rather than the majority's approval of the proposed disposition agreement. What is most troubling here is that the staff indicated to the Commission not only that the rate was in error, but that a surcharge for the DNR project was appropriate – two key elements which will have a substantial effect on this small utility. This begs the question – since these two elements are important, why were they not included in the settlement agreement? Safe and adequate service rests on financial stability as well as meeting DNR health and safety requirements.

Settlement is not a substitute for regulation, even when it is a part of the overall regulatory process. This Commission must remain mindful that where a regulated entity enters into a settlement, it is not a disposition of the matter, but rather a proposal to the Commission for disposition. When a civil litigation mindset is wrapped around this Commission's settlement processes, and that framework is used to further the disposition of a matter, the result flies squarely in the face of the balance that this Commission is entrusted to administer in

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furtherance of its statutory duties. That is why I find it necessary to bring to the attention of the majority in this case that this Commission is not a court, because by viewing this Commission as a court would ultimately serve to undermine the Commission's regulatory effectiveness. Reaching a result based solely upon the desire of the parties is fundamentally flawed in a regulated environment. For the foregoing reasons, I must respectfully dissent.

In the Matter of an Investigation into the Tree Trimming Policies of Union Electric Company, d/b/a AmerenUE

*File No. EW-2004-0583
Decided: March 11, 2009*

Electric §33. Because AmerenUE met its goal of having its distribution system trimmed on a four-year cycle for its urban area, and a six-year cycle for its rural areas, the Commission ended AmerenUE's duty to continue to file quarterly and annual reports on its vegetation management practices.

Service §11. The Commission promulgated Commission Rule 4 CSR 240-23.030, making the reporting requirements the Commission ordered in the case redundant; thus, the Commission ordered that AmerenUE is excused from filing the same information twice with the Commission.

ORDER GRANTING MOTION TO END REPORTING REQUIREMENT

Syllabus: This order ends the requirement of Union Electric Company, d/b/a AmerenUE (hereafter "AmerenUE"), to report its tree-trimming policies in this matter.

Procedural History

On March 31, 2005, the Commission issued its Order Regarding Union Electric Company's Tree-Trimming Policies and Closing Case (hereafter "Reporting Order"). That order required AmerenUE to file quarterly and annual reports on its vegetation management practices.

On February 13, 2009, AmerenUE filed a Motion to End Reporting Requirement. AmerenUE states that it has met the goal of the Reporting Order, which was to have all of AmerenUE's distribution system trimmed on a four-year cycle for its urban area, and on a six-year cycle for its rural areas, no later than December 31, 2008. Moreover, AmerenUE points out that the Commission has promulgated Commission Rule 4 CSR 240-23.030, *et seq.* Those rules require

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AmerenUE to make filings similar to the ones being done in this file, which AmerenUE did on July 1, 2008, in File No. EO-2009-0012. Thus, AmerenUE argues that the reporting requirements for this file are redundant, and that AmerenUE should be excused from filing duplicative information in both files.

Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to motions. No party has responded to AmerenUE's motion.

Decision

The Commission takes up AmerenUE's motion unopposed, finds it reasonable, and will grant it. AmerenUE will no longer be required to report its vegetation management practices in this file.

THE COMMISSION ORDERS THAT:

1. The Motion to End Reporting Requirement filed by Union Electric Company, d/b/a AmerenUE is granted.
2. Nothing in this order shall be construed to relieve Union Electric Company, d/b/a AmerenUE, of its duties to report its vegetation management practices to the Commission as required by Commission Rule 4 CSR 240-23.030 *et seq.*
3. This order shall become effective on March 21, 2009.
4. This file shall be closed on March 22, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Pridgin, Senior Regulatory Law Judge

In the Matter of the 2009 Resource Plan of KCP&L Greater Missouri Operations Company Pursuant to 4 CSR 240-22.

File No. EE-2009-0237
Decided: March 11, 2009

Electric §1. The Missouri Public Service Commission grants KCP&L Greater Missouri Operating Company ("GMO") a conditional waiver of fifteen specified technical requirements of the Commission's Integrated Resource Planning Rule ("IRP"), I.e. 4 CSR 240-22, for its upcoming IRP filing.

Electric §7. GMO is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (43), RSMo Cum. Supp. 2008, and is subject to the personal

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jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

Electric §14. Commission Rule 4 CSR 240-22.080(11) allows the Commission to waive any provision of the IRP rule upon a showing of good cause.

Good cause for a waiver of Commission rules means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law. To constitute *good* cause, the reason or legal excuse given must be real not imaginary, substantial not trifling, and reasonable not whimsical. And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.

Electric §40. The purpose of the IRP filing is to ensure that investor-owned electric utilities, such as KCP&L-GMO, consider all options, including demand side efficiency and energy management measures, to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest.

ORDER GRANTING KCP&L-GMO'S REQUEST FOR WAIVERS

KCP&L Greater Missouri Operating Company's 2009 Integrated Resource Planning Filing (IRP) is due to be filed on August 5, 2009. On December 4, 2008, KCP&L-GMO filed an application asking the Commission to waive fifteen specified technical requirements of the Commission's Integrated Resource Planning rule, 4 CSR 240-22 for that upcoming filing.

The Commission provided notice of KCP&L-GMO's application to the parties to KCP&L-GMO's last IRP case, File No. EO-2007-0298, and established a deadline for the submission of applications to intervene. Subsequently, the Commission allowed Dogwood Energy, LLC, the Missouri Department of Natural Resources, and the Sedalia Industrial Energy Users' Association to intervene. The Commission ordered its Staff to file a recommendation regarding KCP&L-GMO's request for waivers by January 13, 2009. The Commission also ordered that any other party wishing to respond to the request for waivers do so by January 13.

Staff filed its recommendation on January 13, followed by a corrected recommendation on January 14. Staff advises the Commission to grant waiver requests 1 through 8 and 11 through 15 without condition. Staff advises the Commission to grant waiver number 9 and 10 if KCP&L-GMO agrees to provide certain additional details in its upcoming IRP filing.

The Missouri Department of Natural Resources (MDNR) filed a response to KCP&L-GMO's application on January 9. MDNR also does not oppose any of the requested waivers, but asks that KCP&L-GMO be

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required to provide additional details in its IRP filing regarding the subjects of waiver requests 3, 4, 5, 12, and 14.

On February 9, KCP&L-GMO filed a response to Staff's recommendations and MDNR's comments. In its response, KCP&L-GMO agrees to provide the additional information sought by Staff and MDNR as part of its IRP filing. Neither Staff, nor MDNR replied to KCP&L-GMO's February 9 response.

The purpose of the IRP filing is to ensure that investor-owned electric utilities, such as KCP&L-GMO, consider all options, including demand side efficiency and energy management measures, to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest. The Commission's IRP rule requires the electric utility to file quite specific information as part of its IRP and sometimes the information specified in the rule may not be the best measure of the utility's compliance with the intent of the rule. For that reason, 4 CSR 240-22.080(11) allows the Commission to waive any provision of the IRP rule upon a showing of good cause. Based upon KCP&L-GMO's application, Staff's recommendation, MDNR's response to that application, and KCP&L-GMO's response to the pleadings of Staff and MDNR, the Commission finds that KCP&L-GMO has shown good cause to waive the fifteen provisions of the IRP rule described in its application. The Commission grants those waivers subject to the conditions described by Staff and MDNR.

THE COMMISSION ORDERS THAT:

1. The Application For Waivers Concerning the 2009 Integrated Resource Plan Submission of KCP&L Greater Missouri Operations Company is granted, subject to the conditions described by the Staff of the Commission in its corrected recommendation and subject to the conditions described by the Missouri Department of Natural Resources in its response to KCP&L Greater Missouri Operations Company's request for waivers.

2. The Commission's approval of the waivers requested by KCP&L Greater Missouri Operations Company is granted for this case only, and shall not to be taken as a general waiver of any aspect of the rule in any future proceeding.

3. This order shall become effective upon issuance.

Clayton, Chm., Murray, Davis, Jarrett,
and Gunn, CC., concur.

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Woodruff, Deputy Chief Regulatory Law Judge

**In Re: Union Electric Company's 2008 Utility Resource Filing
Pursuant to 4 CSR 240- Chapter 22**

Case No. EO-2007-0409

Decided: March 18, 2009

Electric §42. The Commission modified its final order to extend the filing date for AmerenUE next IRP filing from April 1, 2010 to June 1, 2010.

**ORDER MODIFYING FINAL ORDER REGARDING AMERENUE'S
2008 INTEGRATED RESOURCE PLAN**

On February 19, 2009, the Commission issued a Final Order Regarding AmerenUE's 2008 Integrated Resource Plan (IRP). In that order, the Commission found that AmerenUE's 2008 IRP and resource acquisition strategy did not demonstrate compliance with the Commission's IRP rule. As a result, the Commission ordered AmerenUE to file its next IRP a year early, on April 1, 2010, instead of April 1, 2011.

AmerenUE filed a timely Application for Rehearing and Motion for Clarification on February 27, 2009. AmerenUE contends the new April 1, 2010 filing date would not allow the company enough time to properly prepare its next IRP. It asks that the filing deadline instead be set for November 1, 2010. In addition, AmerenUE asks the Commission to clarify its order to indicate that AmerenUE's next IRP may be developed using the Commission's IRP rule in its current form, rather than in compliance with any revised version of the rule the Commission may promulgate between now and the filing of its next IRP.

Public Counsel responded to AmerenUE's Application for Rehearing and Motion for Clarification on March 10, 2009. Public Counsel opposes AmerenUE's request to move the next IRP filing deadline to November 1, 2010, and supports leaving the deadline at April 1, 2010. If the Commission does decide to extend the deadline, Public Counsel urges the Commission to extend the deadline only to June 1, 2010.

No other party responded directly to AmerenUE's Application for Rehearing and Motion for Clarification. However, Noranda Aluminum,

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Inc., and the Commission's Staff replied to Public Counsel's response. Noranda does not oppose Public Counsel's proposed modification, but encourages the Commission to push AmerenUE to quickly assess whether a new base load plant is needed. Staff supports the filing date proposed by Public Counsel and supports AmerenUE's request that it be allowed to file its next IRP using the existing IRP rule.

The Commission established the April 1, 2010 deadline for AmerenUE to file its next IRP so that other interested parties would have sufficient time to review and respond to that filing before AmerenUE makes a decision about whether to proceed with plans to build a new base load unit, including a possible second nuclear reactor at the company's Callaway plant. In its Application for Rehearing, AmerenUE represents that it would not make a decision about building a new base load unit until at least October 1, 2011, eleven months after November 1, 2010.

Public Counsel is concerned that AmerenUE's next IRP filing may be hotly contested and could well take longer than the 13 months consumed by this case, before it is resolved. For that reason, Public Counsel urges the Commission to set the next filing deadline no later than June 1, 2010, which would allow 17 months for the Commission to resolve the next IRP case before AmerenUE makes a decision on whether to build a new base load electric plant.

The Commission agrees it is vitally important for AmerenUE to complete a fully compliant IRP before it decides whether to build a new base load electric plant. So that the Commission will have sufficient time to ensure AmerenUE's next IRP complies with the IRP rule, the Commission will extend the filing deadline only to June 1, 2010.

Of course, the ultimate goal of the IRP process is to ensure that AmerenUE carefully considers all options to provide safe, reliable, and efficient electric service to the public at reasonable rates. By setting an expedited deadline for AmerenUE to complete its next IRP, the Commission does not wish to push the company into cutting corners that would result in a less than optimum IRP filing. If, as it proceeds with the IRP process, after consulting with the various stakeholders who will be involved in that process, AmerenUE believes it needs an extension of time to produce a high quality IRP filing, it may file an appropriate motion to request such an extension.

AmerenUE also asks the Commission to clarify its order to provide that AmerenUE's next IRP filing shall be developed using the current IRP rule rather than any revised IRP rule the Commission may

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choose to promulgate before the next filing deadline. Public Counsel does not object to AmerenUE's request.

The Commission finds that AmerenUE's request is reasonable. The company needs to know the rule provisions with which it must comply as it prepares its next IRP. Therefore, the Commission will clarify that AmerenUE shall develop its next IRP using the IRP rule in its current form.

THE COMMISSION ORDERS THAT:

1. The Commission's Final Order Regarding AmerenUE's 2008 Integrated Resource Plan is modified to provide that Union Electric Company, d/b/a AmerenUE, shall file its next Integrated Resource Plan no later than June 1, 2010.
2. Union Electric Company, d/b/a AmerenUE, shall develop its next Integrated Resource Plan using the Commission's Integrated Resource Planning rule in its current form.
3. This order shall become effective on March 28, 2009.

Murray, Davis, Jarrett, and Gunn, CC., concur;
Clayton, Chm., dissents.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: Another order in this case can be found at page 432.

Shawnee Bend Development Company, L.L.C., Petitioner, v. Lake Region Water & Sewer Company, f/k/a Four Seasons Water & Sewer Company, Respondent.

File No. WC-2009-0116
Decided: March 18, 2009

Evidence, Practice and Procedure §28. The Commission has no legal authority to interpret a contract provision that would purport to compel the contracting parties to submit a contract dispute to mediation before the Commission.

Evidence, Practice and Procedure §28. Even if both parties to a contract dispute agreed to submit their dispute to the Commission for mediation, the Commission would have no authority to hear a controversy beyond its jurisdiction.

ORDER GRANTING MOTION TO DISMISS

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Shawnee Bend Development Company, L.L.C., filed a request for the Commission to arbitrate a dispute between Shawnee Bend Development and Lake Region Water & Sewer Company, f/k/a Four Seasons Water & Sewer Company, a public utility, under Section 386.230, RSMo. Lake Region filed its answer to the petition for arbitration, including a motion to dismiss the arbitration citing a failure of Shawnee Bend to exhaust other contractually required remedies¹ before filing this matter at the Commission. Shawnee Bend also raised other affirmative defenses in its response. The Commission now takes up the motion to dismiss the arbitration.

The Commission is a creature of statute and only has the powers granted to it by the legislature.² The Commission is granted authority under Section 386.230, RSMo, to arbitrate “[w]hensoever any public utility has a controversy with another public utility or person **and all the parties to such controversy agree in writing** to submit such controversy to the commission as arbitrators. . . .”³ Thus, in order for the Commission to arbitrate this matter, the parties must first agree in writing to such arbitration.

Although the written contract contains a provision indicating conditional agreement to arbitration, Lake Region states that it does not agree to submit this matter to the Commission for arbitration because that condition has not been met.⁴ Shawnee Bend alleges that some informal contact with the Water and Sewer Department Staff has been made.⁵ In order for the Commission to determine if there has been an agreement to arbitrate this matter, it would have to interpret the meaning of that arbitration clause of the agreement and its condition precedent of

¹ Article IV, Paragraph F of the agreement, which is the subject of this dispute, states that:

In the event of a dispute between the parties with respect to this Agreement, which the parties have negotiated in good faith to an impasse, the parties agree to submit the dispute to the Water and Sewer Department of the PSC for informal and non-binding mediation. If no resolution is produced by such informal mediation, the parties agree to submit such controversy to the PSC with the commissioners to act as arbitrators under the provision of section 386.230 RSMo. Each party shall bear its own attorney fees and costs associated with such dispute.

² State ex rel. Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 49 (Mo. banc 1979).

³ Emphasis added.

⁴ Response of Lake Region Water & Sewer Co. to Petition for Arbitration, (filed November 6, 2008).

⁵ Notice of Arbitration (Petition of Arbitration) and Statement of Claim Pursuant to R.S.Mo. § 386.230 and Contract (“Petition”), filed September 30, 2008, paras. 24-25.

submitting the issue to informal mediation by the Water and Sewer Department Staff.⁶

The Commission cannot interpret the contract of the parties as it has no authority to do so.⁷ Thus, the Commission cannot determine whether the condition precedent to the submission of the contract for arbitration has been reached. Without the written consent of *both* parties, the Commission cannot proceed with an arbitration and this matter must be dismissed.

Furthermore, the actual controversy at issue is strictly the result of a contract dispute. In fact, the remedies and alternative requested in the petition are titled "Enforcement of Contract," "Quantum Meruit/unjust enrichment," and "Rescission of Contract with Restitution. . . ."⁸ Even if both parties agree to submit the controversy, the Commission could not hear it. Section 386.230, RSMo, cannot give the Commission authority to hear controversies beyond its jurisdiction. For example, just because a utility has a dispute with its employee for worker's compensation, jurisdiction would not be vested in the Commission simply because Section 386.230, RSMo, says that the Commission may arbitrate such matters. Likewise, just because the parties have a contract dispute does not mean that this type of controversy may be heard by the Commission. Therefore, the Commission determines that a remedy for breach of contract lies with the court, and not with the Commission.

THE COMMISSION ORDERS THAT:

1. The motion to dismiss filed by Lake Region Water & Sewer Company is granted.
2. This order is effective on March 28, 2009.

⁶ Article IV, Paragraph F.

⁷ See, *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680, 696, (Mo. App. W.D. 2003):

While the "Commission does have exclusive jurisdiction of all utility rates," "when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge." *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission "cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment." *Id.* (quoting *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. *Am. Petroleum Exch. V. Pub Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943).

⁸ Petition, pp. 10-12.

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Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

In the Matter of the Application of KCP&L Greater Missouri Operations Company¹ for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Certain Areas of Cass County, Missouri Near the City of Peculiar

*Case No. EA-2009-0118
Decided March 18, 2009*

Electric §1. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company ("GMO") a certificate of public convenience and necessity to construct, install, own, operate, maintain, and otherwise control and manage electrical power production and related facilities at the South Harper Facility consisting of three 105 MW natural gas-fired combustion turbines and an associated transmission substation.

Electric §3. Section 393.170 authorizes the Commission to grant a certificate of convenience and necessity ("CCN") when it determines, after due hearing, that the proposed project is necessary or convenient for the public service.

Electric §3. It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.

Electric §3. The Commission has articulated five specific criteria to be used when evaluating applications for electric utility CCNs. The applicant must prove: (1) there is a need for the service; (2) it is qualified to provide the proposed service; (3) it has the financial ability to provide the service; (4) its proposal is economically feasible; and (5) the service promotes the public interest.

Electric §3. The public interest is a matter of policy to be determined by the Commission.

Electric §3. The "public interest" necessarily must include the interests of both the ratepaying public and the investing public; however, the rights of individual groups are subservient to the rights of the public in general.

¹ On November 20, 2008, in Case No. EN-2009-0164 and in Case No. HN-2009-0165 the Commission granted the Company's applications regarding its change of name from Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company. On December 4, 2008, the Commission issued its order setting the date for the On-The-Record Presentation in this matter. In that same order, the Commission, recognizing Aquila, Inc.'s approved name change, ordered the caption of this case be changed to remove any reference to Aquila, Inc. and replace it with KCP&L Greater Missouri Operations Company. See EFIS Docket Entry No. 13, *Order Scheduling an On-The-Record Presentation*, issued on December 4, 2008. EFIS is the Commission's Electronic Information and Filing System.

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Electric §7. GMO is an “electrical corporation” and a “public utility,” as defined in Sections 386.020(15) and (43), RSMo Cum. Supp. 2008, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

Electric §7. Section 393.170, confers subject matter jurisdiction to the Commission for granting CCNs.

Electric §7. Section 393.170 grants the Commission approval authority only if that authority is exercised prior to start of construction.

Electric §7. The Commission has the authority to grant GMO a post-construction CCN for the South Harper power plant and the Peculiar substation pursuant to Section 393.171, RSMo, Cum. Supp. 2008.

Electric §10. On July 31, 2008, the Cass County Commission voted 3-0 to approve the South Harper Plant special use permit application.

Electric §10. On February 3, 2009, the City of Peculiar's Board of Aldermen approved the special use permit application for GMO's Peculiar Substation.

Electric §10. GMO obtained all local, state and nationally required permits for construction of the facilities including: Cass County Construction Permit; Cass County Road, Bridge and Driveway Permit; Public Water Supply District Number 7 Water Supply Agreement; West Peculiar Fire Protection District Fire Protection Agreement; Missouri Department of Natural Resources Construction and Operation Permits; National Pollution Discharge Elimination System (“NPDES”) Land Disturbance Permit; NPDES Land Irrigation Permit; and the Cass County Health Department Sanitary Water/Sewage Permit.

Electric §14. Commission Rule 4 CSR 240-3.015 provides the Commission with authority to grant a waiver or variance from its filing rules in Chapter 3.

Electric §14. Commission Rule 4 CSR 240-2.060 delineates the filing requirement for requested waivers or variances from Chapter 3 waiver filing requirements.

Electric §14. The “good cause” requirement for granting a waiver or variance is satisfied upon a legitimate factual showing of a substantial cause or reason for excusing the legal requirement.

Electric §14. Commission Rule 4 CSR 240-3.105(1)(B)2, requires an applicant for a CCN to submit a study containing the plans and specifications for the project and the estimated cost of construction.

Electric §14. GMO demonstrated good cause existed to excuse it from the filing requirements of Commission Rule 4 CSR 240-3.105(1)(B)2 because the facilities were already constructed and the actual cost of that construction was already known.

Electric §42. With demand increasing in GMO's Missouri service area, including Cass County, and the need for year-round peaking capability, the South Harper Facility's three 105 MW simple-cycle CTs provide greater flexibility to meet the needs of the GMO's customers.

Electric §42. Granting GMO's Application is in the public interest because the electrical power generated by the South Harper Facility will be rate-based capacity available to serve the increasing demand for electrical power GMO's customers, and the Facilities improve the reliability of GMO's transmission system, improve the overall efficiency and economics of GMO's transmission operations, and provide reactive power to control voltage on the transmission network.

Evidence, Practice and Procedure §3. Pursuant to Section 536.070, RSMo 2000, agencies shall take official notice of all matters of which the courts take judicial notice and courts may take judicial notice of other proceedings when the cases are interwoven or interdependent.

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Evidence, Practice and Procedure §8. Adopting a stipulation and agreement in a contested case is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18.

Evidence, Practice and Procedure §23. The Commission met its requirement for the hearing when it issued notice, allowed interested entities to intervene, and allowed an opportunity for any party to be heard on any identified issue in this matter.

Evidence, Practice and Procedure §24. Contested cases are proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

Evidence, Practice and Procedure §24. Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without *separately stating* findings of fact and conclusions of law.

Evidence, Practice and Procedure §24. Pursuant to Section 386.420, the Commission must include findings of fact in its written report, even if not separately stated, in all contested cases.

Evidence, Practice and Procedure §24. Findings of fact must be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.

Evidence, Practice and Procedure §24. Qualification of a witness as an expert rest within the fact-finder's discretion.

Evidence, Practice and Procedure §24. Witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony."

Evidence, Practice and Procedure §24. An administrative agency as fact-finder receives deference when choosing between conflicting evidence.

Evidence, Practice and Procedure §24. The Commission "may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it."

Evidence, Practice and Procedure §24. The Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter, and when interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.

Evidence, Practice and Procedure § 26. As petitioner, GMO has the burden of proving that CCNs for the Facilities are necessary or convenient for the public service by the preponderance of the evidence standard. In order to meet the preponderance standard, GMO must convince the Commission it is "more likely than not" that the grant of the CCN is necessary or convenient for the public service.

Evidence, Practice and Procedure §27. An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.

Evidence, Practice and Procedure §27. Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.

Evidence, Practice and Procedure §27. The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.

Evidence, Practice and Procedure §27. The adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.

Evidence, Practice and Procedure §27. Pursuant to Article V, Section 18 of the Missouri Constitution, and Section 536.100, RSMo 2000, all final decisions, findings, rules and

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orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law.

Evidence, Practice and Procedure §27. Pursuant to Sections 386.500 and 386.510, RSMo 2000, any interested person, party or entity may seek a writ of review with the circuit court for the purpose of having the reasonableness or lawfulness of the Commission's final order or decision inquired into or determined.

Evidence, Practice and Procedure §27. No cause or action arising out of any order or decision of the commission shall accrue in any court unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing, and the applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.

Evidence, Practice and Procedure §27. No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it.

APPEARANCES

Appearing For KCP&L Greater Missouri Operations Company:

KARL ZOBRIST, SONNENSCHN, NATH & ROSENTHAL, L.L.P., 4520 Main Street, Suite 1100, Kansas City, Missouri 64111,
And CURTIS D. BLANC, 1201 Walnut, 20th Floor, P.O. Box 418679, Kansas City, Missouri 64106.

Appearing For the County of Cass, Missouri:

MARK W. COMLEY, NEWMAN, COMLEY & RUTH P.C., 601 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102,
And CINDY REAMS MARTIN, 408 S.E. Douglas, Lee's Summit, Missouri 64036.

Appearing for Dogwood Energy, L.L.C.:

CARL J. LUMLEY, CURTIS, OETTING, HEINZ, GARRETT & O'KEEFE, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105.

Appearing for the Sedalia Industrial Energy Users Association:

STUART W. CONRAD, FINNEGAN, CONRAD & PETERSON, L.C., 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111,
And DAVID L. WOODSMALL, FINNEGAN, CONRAD & PETERSON, L.C., 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65101.

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Appearing for the Office of the Public Counsel and the Public:

LEWIS R. MILLS, JR., Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.

Appearing for the Staff of the Missouri Public Service Commission:

NATHAN WILLIAMS, Deputy General Counsel, Missouri Public Service Commission, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Harold Stearley

REPORT AND ORDER

Syllabus: This order grants KCP&L Greater Missouri Operations Company certificates of convenience and necessity for the South Harper power plant and the Peculiar 345 kV substation, both being located in Cass County, Missouri.

I. Procedural History

A. Application and Ancillary Filings

On September 30, 2008, KCP&L Greater Missouri Operations Company ("GMO") filed an application² with the Commission requesting Certificates of Convenience and Necessity ("CCNs") for two facilities previously approved by the Commission; (a) the South Harper power plant and related infrastructure and (b) the Peculiar 345 kilovolt ("kV") substation recently annexed by the City of Peculiar.³

The Commission had previously concluded that GMO, formerly Aquila Inc.,⁴ had specific authorization to construct these facilities in its

² The application was filed pursuant to Section 393.170, 393.171, RSMo 2000, 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B).

³ Both of these facilities are located in Cass County, Missouri. The Commission uses the word "facilities" throughout this order to mean "electric plant" or "electric plants" as contemplated by Section 393.171, RSMo, Cum. Supp. 2008.

⁴ On November 20, 2008, in Case No. EN-2009-0164 and in Case No. HN-2009-0165 the Commission granted the Company's applications regarding its change of name from Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company. On December 4, 2008, the Commission issued its order setting the date for the On-The-Record Presentation in this matter. In that same order, the Commission, recognizing Aquila, Inc.'s approved name change, ordered the caption of this case be changed to remove any reference to Aquila, Inc. and replace it with KCP&L Greater Missouri Operations Company. See EFIS Docket Entry No. 13, *Order Scheduling*

Order Clarifying Prior Certificates of Convenience and Necessity in Case No. EA-2005-0248, issued April 7, 2005. The Commission also granted specific Certificates of Convenience and Necessity for these facilities in its Report and Order issued May 23, 2006, in Case No. EA-2006-0309. These orders were overturned by Missouri courts after challenges;⁵ however, the Missouri General Assembly passed Section 393.171, RSMo Supp. 2008,⁶ granting the Commission authority for one year after the effective date of that statute to issue a certificate for facilities falling within its scope, which includes these Cass County facilities. Section 393.171 took effect on August 28, 2008, and the authority conveyed to the Commission in that section sunsets on August 28, 2009.

In conjunction with its Application, GMO filed appendices containing, *inter alia*: (1) a map of the tracks of land where the two facilities are located; (2) the legal descriptions of the tracks of land where the two facilities are located; (3) a list of all permits and clearances for both sites, including renewed Cass County building and occupancy permits; (4) a map showing by township number the major portion of GMO's service territory in Jackson and Cass Counties; and (5) a copy of the GMO's "Public Outreach Initiative"; and a copy of GMO's Cass County Special Use Permit application.⁷

B. Notice and Interventions

On October 7, 2008, the Commission issued notice and set a deadline for intervention requests. On October 21, 2008, the Commission granted timely requests for intervention to Dogwood Energy, L.L.C., the County of Cass, Missouri, and the Sedalia Industrial Energy Users' Association.

C. Procedural Schedule

The Commission held a procedural conference on November 6, 2008, and the parties jointly filed a status report on November 13, 2008. In the joint status report the parties indicated that following a brief period of discovery they believed they would resolve any material differences by stipulation. No party requested an evidentiary hearing or a local public hearing.

an On-The-Record Presentation, issued on December 4, 2008. EFIS is the Commission's Electronic Information and Filing System.

⁵ *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005); *State ex rel. Cass County v. Public Serv. Comm'n*, 259 S.W.3d 544 (Mo. App. 2008).

⁶ All other references to the Missouri Revised Statutes refer to RSMo 2000, unless otherwise noted.

⁷ See EFIS Docket Entry No. 1, Application, filed on September 30, 2008; EFIS Docket Entry No. 2, Special Use Permit and Zoning Application, filed on October 1, 2008.

D. Stipulation and Agreement

On January 9, 2009, the Commission's Staff, the Office of the Public Counsel ("Public Counsel"), KCP&L Greater Missouri Operations Company ("GMO"), Dogwood Energy, L.L.C. ("Dogwood"), and Cass County, Missouri ("Cass County") (collectively, the "Signatories," and individually, a "Signatory") submitted to the Commission a Stipulation and Agreement ("Agreement") regarding GMO's application.⁸ The Sedalia Industrial Energy Users' Association ("SIEUA") is the only party who is not a signatory to the Agreement; however, SIEUA through its counsel advised the Signatories that it would not oppose the Agreement and would not seek a hearing.⁹

Pursuant to Commission Rule 4 CSR 240-2.115(2), each party has seven days from the filing of a non-unanimous stipulation and agreement to file an objection and fail to so file constitutes a full waiver of that parties' right to a hearing. Additionally, should no party object, the Commission may treat the nonunanimous stipulation and agreement as if it were unanimous.¹⁰ No party objected to the Agreement within the time allowed by the Commission's rule and on January 21, 2009, the Commission issued a notice to the parties informing them that the nonunanimous Agreement would be treated as though it were unanimous. No party objected or sought reconsideration of the Commission's decision.¹¹

E. On-The-Record Presentation and Case Submission

On February 19, 2009, to allow the Commissioners an opportunity to question counsel for the parties and witnesses about the specifics of the Agreement, the Commission convened an on-the-record presentation at its offices in Jefferson City, Missouri. The Commission admitted the testimony of one witness¹² and received six exhibits into evidence.¹³ No briefing schedule was requested or ordered. The

⁸ Exh. 5, *Stipulation and Agreement*, p. 1.

⁹ *Id.*

¹⁰ Commission Rule 4 CSR 240-2.115(2)(C).

¹¹ Commission Rule 4 CSR 240-2.160(2) requires that any motion for reconsideration of an interlocutory order must be filed within ten days of the date the order was issued.

¹² The Commission heard the testimony of Scott H. Heidtbrink on behalf of GMO. However, the Commission's Staff made two witnesses available if the Commission wished to adduce further testimony. Those witnesses were Dan Beck, Supervisor of the Commission's Engineering Analysis Department and Lena Mantle, Manager of the Commission's Energy Department.

¹³ At the hearing, GMO did not have a copy of its Application to offer into evidence. The Commission reserved exhibit number 6 for the Application and instructed GMO to file a copy of the exhibit. Because all parties had been given the opportunity to previously review

transcript was filed on March 9, 2009, and the case was deemed submitted for the Commission's decision.¹⁴

II. Findings of Fact

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without *separately stating* findings of fact and conclusions of law. However, this permissive edict does not relieve the Commission of its statutory duty to properly evaluate GMO's application and determine if granting the requested certificate is necessary or convenient for the public service. The Signatories to the Agreement may believe that GMO has satisfied its burden for the grant of the requested CCNs, but the Commission must decide if the CCNs are justified based upon the factual record. Moreover, Missouri Courts, interpreting Section 386.420 have held that in contested cases (i.e. proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing), the Commission must include findings of fact in its written report.¹⁵ Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18.¹⁶ Consequently, the Commission will include separately stated findings of fact and conclusions of law supporting its decision in this matter.

Missouri courts have not adopted a bright-line standard for

the Application, the Commission inquired as to whether there would be any objections to the admission of Exhibit 6 once it was properly filed. No party objected. Transcript pp. 35-37. On February 24, 2009, GMO filed a copy of the Application as Exhibit 6. The parties were given a second opportunity to respond and no party filed any objections to the admission of Exhibit 6. See EFIS Docket Entry No. 21, *Order Establishing Deadline for Objections*, issued February 25, 2009. The exhibit has been received into the record.

¹⁴ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

¹⁵ Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article V, Section 18; however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffman v. Public Serv. Comm'n*, 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm'n*, 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

¹⁶ *Id.*

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determining the adequacy of findings of fact.¹⁷ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.¹⁸

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."¹⁹ Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."²⁰

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise, and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the fact-finder's discretion,²¹ but witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony."²² An administrative agency as fact-finder also receives deference when

¹⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

¹⁸ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

¹⁹ *State ex rel. Int'l. Telecharge, Inc. v. Public Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Public Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

²⁰ *State ex rel. Monsanto Co. v. Public Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

²¹ *State ex rel. Missouri Gas Energy v. Public Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

²² *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

choosing between conflicting evidence.²³ In fact, the Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.”²⁴

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.²⁵ And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.²⁶ Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.²⁷

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.²⁸ When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.²⁹ Consequently, factual determinations made with regard to the Commission’s prior orders receive the same deference shown in relation to all of the Commission’s findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in

²³ *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm’n*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users’ Ass’n. v. Public Service Comm’n.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Comm’n*, 703 S.W.2d 577 (Mo. App. 1986).

²⁴ *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Serv. Comm’n*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

²⁵ *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

²⁶ *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm’n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

²⁷ *Id.*

²⁸ *State ex rel. Beaufort Transfer Co. v. Public Serv. Comm’n of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Serv. Comm’n*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Serv. Comm’n*, 110 S.W.2d 364, 366 (1937).

²⁹ *Id.*

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the light most favorable to the Commission's decision.³⁰

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

A. The Parties

1. **Kansas City Power and Light Greater Missouri Operations Company** ("GMO") is a Delaware corporation (formerly known as Aquila, Inc.) with its principal office and place of business at 1201 Walnut Street, Kansas City, Missouri 64106-2124. GMO became a wholly-owned subsidiary of Great Plains Energy Incorporated ("GPE")³¹ following its acquisition on July 14, 2008. GMO is an "electrical corporation," "heating company," and "public utility" as those terms are defined by Section 386.020 and is engaged in providing electrical and industrial steam utility service in those areas of the state certificated to it by the Commission.³²

2. **Dogwood Energy, L.L.C.** ("Dogwood") is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri. Dogwood owns the 625 MW combined cycle generating facility located in Pleasant Hill, Missouri, which is within GMO's service territory.³³

3. **The County of Cass, Missouri** ("Cass County") is a First Class County of the State of Missouri under the county classification provisions of Chapter 48, RSMo 2000, and is a political subdivision of the state with powers, duties and obligations as provided by law. Its offices are located in Harrisonville, Missouri, the county seat.³⁴

4. **The Sedalia Industrial Energy Users' Association** ("SIEUA") is an unincorporated voluntary association consisting of large commercial and industrial users of natural gas and electricity in the Sedalia, Missouri and in the surrounding area. SIEUA was formed for

³⁰ *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

³¹ Great Plains Energy Incorporated is also the parent company of Kansas City Power & Light Company ("KCP&L"). See Footnote 32, *infra*.

³² EFIS Docket Entry No. 1, *Application*, filed on September 30, 2009. See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

³³ EFIS Docket Entry No. 6, *Dogwood Energy, L.L.C.'s Application to Intervene*, filed October 16, 2008.

³⁴ EFIS Docket Entry No. 5, *Application to Intervene*, filed on October 15, 2008.

the purpose of economical representation of its members' interests through intervention and other activities in regulatory and other appropriate proceedings.³⁵

5. **The Office of the Public Counsel** ("Public Counsel") is a statutorily-created entity that "*may* represent and protect the interests of the public in any proceeding before or appeal from the public service commission."³⁶ Public Counsel "*shall* have discretion to represent or refrain from representing the public in any proceeding."³⁷

6. **The Staff of the Missouri Public Service Commission** ("Staff") is a party in all Commission proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.³⁸ Staff is represented by the **General Counsel of the Missouri Public Service Commission** who "represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . ."³⁹

³⁵ EFIS Docket Entry No. 4, *Application to Intervene Without Prejudice of Sedalia Industrial Energy Users' Association*, filed October 14, 2008. Current members of SIEUA are as follows: Pittsburgh Corning Corporation, a manufacturer of cellular glass insulation; Waterloo Industries, a manufacturer of tool storage equipment; Hayes-Lemmerz International a manufacturer of automobile wheels; EnerSys Inc. a manufacturer of industrial batteries; Alcan Cable Co. a manufacturer of aluminum electrical conductors; Gardner Denver Corporation a manufacturer of industrial compressors and blowers; American Compressed Steel Corporation a scrap metal recycling facility; and Stahl Specialty Company, a manufacturer of specialty and precision aluminum castings. Collectively, these SIEUA members provide gainful employment for approximately 3,815 workers in central Missouri.

³⁶ Sections 386.700 and 386.710; Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

³⁷ Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id.*

³⁸ Commission Rules 4 CSR 240-2.010(11) and 2.040(1).

³⁹ Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel "if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination

B. Witness Demeanor, Credibility and Testimony

7. No prefiled testimony was directed to be filed with the Commission pursuant to Commission Rules and none was received into evidence.⁴⁰

8. GMO proffered one witness, Mr. Scott H. Heidtbrink, who provided direct testimony and was subject to cross-examination by the parties and the Commission.⁴¹

9. Mr. Heidtbrink is currently GMO's Senior Vice President of Supply.⁴²

10. Mr. Heidtbrink was formerly employed by GMO's predecessor-in-interest, Aquila, Inc., and when controversy began concerning the South Harper power plant and Peculiar substation (collectively "the Facilities") he was leading Aquila's Six Sigma deployment operations across Aquila's service area. In early 2006 he became Aquila's Vice President of Generation and Energy Resources which put him in charge of Aquila's power plants and energy resources, including the Facilities.⁴³

11. When Aquila became a subsidiary of Great Plains Energy, Mr. Heidtbrink became GMO's Senior Vice President of Corporate Services, and approximately at the beginning of 2009, he became GMO's Senior Vice President of Supply.⁴⁴

12. Mr. Heidtbrink was in charge of operating the Facilities throughout the time period in which the previous CCNs granted for the Facilities were challenged and ultimately held to have been unlawfully

all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him." *Id.*

⁴⁰ See Commission Rules 4 CSR 240-2.110, 2.130, and 2.135.

⁴¹ Transcript, p. 22.

⁴² Transcript, pp. 21-23. Mr. Heidtbrink earned a Bachelor of Science Degree in Electrical Engineering from State University in 1986. As Vice President of Supply, he is responsible for the generating fleet including 3,200 MW of coal, 548 MW of nuclear, 101 MW of wind and over 2,400 MW of gas/oil. He is responsible for oversight of generation dispatch and wholesale marketing functions; management of the fleets environmental (SO₂, NO_x, etc.) program; and coal, rail and natural gas contracts. He is also accountable for over 1,200 employees; a non-fuel O&M budget of \$214 million; a fuel and purchased power budget of \$533 million and a capital budget of \$163 million. Curriculum Vitae filed with GMO's *Status Report and Notice of Witness*, EFIS Docket Entry No. 17, filed on February 11, 2009.

⁴³ *Id.*

⁴⁴ *Id.*

granted.⁴⁵ Mr. Heidtbrink was in charge of operating the Facilities throughout the time period in which agreement with Cass County was reached and all other lawsuits involving the Facilities were settled.⁴⁶

13. Because of his work with GMO, as well as with GMO's predecessor Aquila, Inc. Mr. Heidtbrink is thoroughly familiar with the issues relating to the South Harper Plant and the Peculiar Substation.⁴⁷

14. No party challenged Mr. Heidtbrink's credentials or his expertise with regard to South Harper Plant and the Peculiar Substation.

15. Mr. Heidtbrink confirmed that all of the factual representations encompassed in GMO's current certificate application (filed on September 30, 2008) and in the Agreement (filed on January 9, 2009) are true and accurate.⁴⁸

16. While on the witness stand, Mr. Heidtbrink was direct, articulate, calm, composed, confident, sincere, and unwavering in his testimony.

17. The testimony provided by Mr. Heidtbrink was substantial and credible.

18. Mr. Heidtbrink possesses and provided technical and specialized knowledge that assisted the Commission with understanding the evidence and determining the facts in issue.

19. The Commission finds that Mr. Heidtbrink is a subject matter expert with regard to the South Harper Plant and the Peculiar Substation based upon his uncontroverted education, training, knowledge, skill, and experience with operating the Facilities, and his involvement with the legal issues surrounding the Facilities.⁴⁹

⁴⁵ Transcript pp. 23-25. See also Exh. 5, *Stipulation*, pp. 2-3; *StopAquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005); *State ex rel. Cass County v. Public Service Comm'n*, 259 S.W.3d 544 (Mo. App. 2008).

⁴⁶ Transcript pp. 23-35.

⁴⁷ Transcript pp. 21-44.

⁴⁸ Transcript p. 43.

⁴⁹ Section 490.065 sets forth the standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings. Section 490.065 states:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made

C. The South Harper and Peculiar Substation Facilities

20. GMO's western Missouri service area includes the majority of Cass County, a first-class non-charter county.⁵⁰

21. The Commission previously authorized GMO's predecessors-in-interest to construct, operate, and maintain electrical facilities and to render electrical service throughout portions of Cass County to further the public convenience and necessity, pursuant to various prior Commission orders.⁵¹

22. In October 2004, GMO's predecessor-in-interest (Aquila, Inc. or "Aquila") began land clearance and site preparation on two tracts of land in Cass County; one for the construction of a peaking power production facility ("South Harper Facility") and one for construction of a related electrical transmission substation ("Peculiar Substation").⁵²

23. Construction of the South Harper Facility and the Peculiar Substation was completed during the summer of 2005, and both were placed into commercial operation and began serving Aquila's (now GMO's) customers during late June and early July of that same year.⁵³

24. The location of the South Harper Facility and the Peculiar Substation are within the service area certificated to Aquila (GMO's predecessor in interest), by the Commission in Case No. 9,470 (1938) and Case No. 11,892 (1950).⁵⁴

25. The South Harper Plant is a peaking electrical production facility that consists of three 105 megawatt ("MW") natural gas-fired combustion turbine units, located on a site designed for six such units,

known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

In *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), the Missouri Supreme Court held that Section 490.065 applied to administrative cases. *Id.* at 153.

⁵⁰ Exh. 5, *Stipulation and Agreement*, p. 4; Transcript p. 43.

⁵¹ Exh. 6, *Application*, pp. 5-6; See also PSC Case Nos. 1,074, 1,449, 3,171, 5,109, 9,470 and 11,892; Transcript p. 43.

⁵² Exh. 6, *Application*, pp. 5-6; Transcript p. 43.

⁵³ *Id.*

⁵⁴ *Id.*

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and an associated electric transmission substation, all located on approximately 38 acres of a 74-acre tract of land in an unincorporated area of Cass County, near the City of Peculiar at East 243rd Street and South Harper Road.⁵⁵

26. The Peculiar Substation is an electrical transmission substation located on approximately 7.5 acres of a 55-acre tract of land at the intersection of 203rd Street and Knight Road in the City of Peculiar. This tract is directly south of 203rd Street, approximately one-half mile west of U.S. 71 Highway, and is adjacent to the intersection of an existing 345 kV electrical transmission line and an existing 161 kV electrical transmission line, both owned by the Company.⁵⁶

27. The South Harper Plant is interconnected to two natural gas pipelines operated by Southern Star Central Gas Pipeline, Inc. ("Southern Star") that cross to a compressor station that is located within the original tract on which the plant is built. These two fuel lines have the necessary capacity and pressure to provide natural gas service to the South Harper Plant as built.⁵⁷

28. Panhandle Eastern Pipe Line Company ("Panhandle Eastern") operates natural gas pipelines located approximately two miles south of the tract that are also interconnected with the South Harper Plant.⁵⁸

29. The South Harper Plant has adequate transmission for the supply of fuel from either Southern Star or Panhandle Eastern, and is not dependent upon a single fuel transmission supplier.⁵⁹

30. Public Water Supply District No. 7 has a major water line located on the eastern edge of the South Harper Facility, convenient for interconnection. The process and potable water capacity required for the South Harper Facility are served by this interconnection. In addition, sufficient water supply capacity is available from this connection to meet the fire fighting requirements that are approved by the West Peculiar Fire

⁵⁵ Exh. 5, *Stipulation and Agreement*, p. 6; Exh. 6, *Application*, p. 9 and Appendix A. This track of land is more particularly described as "Tract A" in Appendix A to the Application, and it is generally located in parts of Sections 29 and 32, Township 45 North, Range 32 West in the County. See also Transcript p. 43.

⁵⁶ Exh. 5, *Stipulation and Agreement*, p. 6; Exh. 6, *Application*, p. 9 and Appendix A. This track of land is more particularly described as "Tract B" in Appendix A to the Application, and is generally located in the northwest quarter of Section 5, Township 45 North, Range 32 West, in the County. See also Transcript p. 43.

⁵⁷ Exh. 5, *Stipulation and Agreement*, p. 7; Transcript p. 43.

⁵⁸ *Id.*

⁵⁹ *Id.*

Protection District.

31. The South Harper Plant and Peculiar Substation are located near electrical transmission lines that existed when the Facilities were built. As part of the construction of these Facilities, a new 161 kV line was built from the South Harper Plant to the Belton South Substation allowing for the future upgrade of existing 69 kV transmission lines as load growth continues to occur in the Raymore/Peculiar area.⁶⁰

D. The Need for Electrical Service

32. Cass County is one of the fastest growing counties in the State.⁶¹

33. The two fastest growing areas in Cass County, formerly served by Aquila's Missouri operations and now served by GMO's operations, are in and around Lee's Summit and from Belton southward to Peculiar.⁶²

34. Regarding transmission needs, a 2002 study analyzed the Grandview, Belton, Harrisonville and Pleasant Hill areas of Cass County and concluded that there was a need to upgrade the 69 kV transmission system serving these areas.⁶³

35. From 2001 to 2007, the number of Aquila's (GMO's) residential customers in Cass County grew by 26.2%. Energy sales expressed as megawatt-hours ("MWh") grew by 36.3%, and usage per residential customer grew by 8.0%. The Company's total system demand for electricity at peak hit an all-time high of 1,967 MW in 2006, an increase of 15.8% from the previous system peak set in 2001.⁶⁴

36. Since as early as May of 2003, Aquila has presented to representatives of the Commission's Staff and Public Counsel information demonstrating the need for peaking capacity of 300 MW during regular reviews of its Integrated Resource Plan ("IRP").⁶⁵

⁶⁰ *Id.* The existing 69 kV lines that are planned for upgrade consist of a line that runs north from the Peculiar Substation to the Belton South Substation, and a line that runs from a switch that is mid-point on the Peculiar/Belton South line near 58 Highway to the Raymore Substation to the east and then farther east to the Pleasant Hill Substation. *Id.*

⁶¹ Exh. 6, *Application*, pp. 11; Transcript p. 43. The Missouri Office of Administration has identified Cass County as one of the top five or six fastest growing counties in the State (based on percentage growth or absolute population growth, respectively) showing an aggregate population increase of 12.5% from 2000 to 2005, and projecting a 24.8% increase from 2000 to 2010. See OA News Release (Apr. 25, 2008). *Id.*

⁶² Exh. 6, *Application*, pp. 19; Transcript p. 43. Lee's Summit is partially located in Cass County and Belton and Peculiar are both situated in Cass County.

⁶³ Exh. 5, *Stipulation and Agreement*, p. 5; Transcript p. 43.

⁶⁴ Exh. 6, *Application*, pp. 11-12; Transcript p. 43.

⁶⁵ *Id.*

37. Construction of the South Harper Facility is consistent with the Company's IRP, and experience has borne out the need for capacity and energy from this generating plant. Since the time the plant entered service in July 2005 through mid-August 2008, the South Harper Facility has operated for 291 days and 2,355 plant operating hours, and supplied over 429,000 MWh of energy to Aquila's customers (now GMO's customers). The South Harper Facility has operated an average of 94 days and 758 plant hours per year, including the period from late January through May 2006 when court orders precluded it from operating.⁶⁶

38. On May 31, 2005, Aquila's (GMO's predecessor-in-interest) Purchased Power Agreement ("PPA") with Calpine, Inc. ("Calpine") expired. The PPA provided for 500 MW of capacity during the summer months from Calpine's natural gas combined-cycle power plant in Pleasant Hill, Missouri, as well as 200 MW in the winter months. Dogwood now owns and operates that power plant formerly known as the "Aries" plant.⁶⁷

39. The 315 MW of capacity provided by the three CTs at the South Harper Facility serve as partial replacement for the expired 500 MW PPA which Aquila had with Calpine and to accommodate load growth. The capacity is also required to comply with Southwest Power Pool, Inc. and North America Electric Reliability Corporation criteria to ensure reliable service.⁶⁸

40. The location of the Facilities is desirable because of their relative proximity to the load center of the western side of the GMO's service area, existing electrical transmission facilities and the availability of fuel from natural gas pipelines near the Project site.⁶⁹

41. South Harper Plant's three 105 MW simple-cycle natural gas-fired combustion turbines provide generating capacity and flexibility to meet the demand for electricity for GMO and its customers in GMO's Missouri service area, including Cass County.⁷⁰

E. GMO's Financial, Technical and Managerial Ability to Provide Electric Service

42. GMO and its predecessors have been authorized by the Commission to conduct business as a regulated public utility and

⁶⁶ *Id.*

⁶⁷ Exh. 5, *Stipulation and Agreement*, p. 6; Transcript p. 43.

⁶⁸ Exh. 6, *Application*, pp. 20; Transcript p. 43.

⁶⁹ Exh. 6, *Application*, pp. 11-12; Transcript p. 43.

⁷⁰ Exh. 5, *Stipulation and Agreement*, p.6; Exh. 6, *Application*, p. 10; Transcript p. 43.

electrical corporation in their certificated areas in Missouri.⁷¹

43. GMO and its predecessors have been engaged in providing electrical service to Cass County, Missouri since the Cass County Court granted its permission and consent in the form of a franchise to one of GMO's predecessors in January 1917.⁷²

44. GMO's predecessors financed the construction of the South Harper Facility with \$140 million of tax-advantaged revenue bonds issued under the economic development authority of the City of Peculiar, pursuant to Article VI, Section 27(b) of Missouri's Constitution, as well as the statutory provisions of Sections 100.010 through 100.200.⁷³

45. GMO's predecessors constructed the Facilities and GMO and its predecessors have been operating the Facilities since 2005.⁷⁴

46. The Facilities are economically feasible and currently provide reliable service.⁷⁵

47. Since beginning operations in 2005, the Facilities have been operated in a safe and responsible manner.⁷⁶

48. GMO has the financial ability to own, operate, control and manage the Facilities.⁷⁷

49. GMO is qualified to own, operate, control and manage the Facilities.⁷⁸

G. Service Quality

50. The Facilities were incorporated into Southwest Power Pool's transmission expansion plan, and now provide consumers with greater access to generation resources in the region.⁷⁹

51. The Facilities improve transmission system reliability to the Cass County portion of GMO's service territory and to the local rural electric cooperative.⁸⁰

52. The Facilities have improved the reliability of the transmission system, have improved the overall efficiency and economics of transmission operations, and provide reactive power to

⁷¹ Exh. 5, *Stipulation and Agreement*, p. 5; Transcript p. 43.

⁷² *Id.*

⁷³ Exh. 5, *Stipulation and Agreement*, pp. 5-6; Transcript p. 43.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Exh. 5, *Stipulation and Agreement*, pp. 4-5; Transcript p. 43.

control voltage on the transmission network.⁸¹

53. The Peculiar Substation relieves the load on other transmission facilities in southern Kansas City, and enhances the overall operation and reliability of the transmission system in that area.⁸²

J. Local Regulatory Requirements

54. As a result of an agreement between Aquila (GMO's predecessor) and Cass County, Aquila filed a special use permit ("SUP") application for the South Harper Plant in May 2008. On July 31, 2008, the Cass County Commission voted 3-0 to approve the South Harper Plant SUP application and directed the County Zoning Officer to work with the GMO, which by that time had acquired Aquila's assets through a merger, to prepare and issue an SUP. The Zoning Officer issued an SUP in accordance with the Cass County Commission's approval and in a form acceptable to GMO on September 12, 2008.⁸³

55. With regard to the Peculiar Substation, GMO filed a Zoning Application with the City of Peculiar ("Peculiar") on September 5, 2008. At the City's request, the application was revised and re-submitted as a SUP application on November 19, 2008. Peculiar's City Planner recommended that the SUP application be approved, and the City Planning & Zoning Commission approved the SUP on January 8, 2009. Peculiar's Board of Aldermen approved the SUP application at its February 3, 2009 meeting.⁸⁴

56. All local, state and nationally required permits were obtained for construction of the Facilities including: Cass County Construction Permit; Cass County Road, Bridge and Driveway Permit; Public Water Supply District Number 7 Water Supply Agreement; West Peculiar Fire Protection District Fire Protection Agreement; Missouri Department of Natural Resources Construction and Operation Permits; National pollution discharge Elimination System ("NPDES") Land Disturbance Permit; NPDES Land Irrigation Permit; Cass County Health Department Sanitary Water/Sewage Permit.⁸⁵

⁸¹ Exh. 5, *Stipulation and Agreement*, pp. 5-6; Transcript p. 43.

⁸² *Id.*

⁸³ Exh. 1, *Memorandum of Agreement*, April 21, 2008; Exh. 2, *Addendum to Memorandum of Agreement*, July 31, 2008; Exh. 3, *Special Use Permit Application*; Exh. 4, *Resolution 2009-7*, Board of Aldermen of the City of Peculiar, February 3, 2009; Exh. 5, *Stipulation and Agreement*, pp. 7-8; Exh. 6, *Application*, see in particular Appendices 1-9; Transcript pp. 24-35, 37-43.

⁸⁴ *Id.*

⁸⁵ Exh. 3, *Special Use Permit Application*; Exh. 6, *Application*, see in particular Appendix 6; Transcript p. 43. In addition to the permits obtained GMO included, with its SUP

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57. All private claims and lawsuits relating either to the South Harper Plant or the Peculiar Substation have been resolved and settled.⁸⁶

58. There are no pending claims or lawsuits relating to the Facilities.⁸⁷

K. Ultimate Material Facts Contained Within the Agreement

59. In addition to other facts agreed upon by the Signatories to the Agreement, the Signatory Parties have stipulated to the following facts:⁸⁸

- a. GMO has the financial ability to own, operate, control and manage the Facilities;⁸⁹
- b. GMO is qualified to own, operate, control and manage the Facilities;⁹⁰
- c. the Facilities are economically feasible and currently provide reliable service;⁹¹ and,
- d. the Facilities promote the public interest by providing generation and transmission capacity available to serve the public's increasing demand for electrical power in Cass County, as well as nearby areas.⁹²

Application and with the Application pending before the Commission, all supporting documentation involved with obtaining required permits and with situations in which no permits were required including: Noise Study, Residential Noise Assessment Study, Facility Lighting Plan, Facility Security Guidance Documents, West Peculiar Fire Department Equipment List, Ground Level Emissions Comparison Memorandum, Dust Control Notification, United States Army Corps of Engineers Correspondence, United State Fish and Wildlife Correspondence, Missouri Department of Conservation Correspondence, State Historic Preservation Office Correspondence, Structure Height Notification Memorandum, Federal Emergency Management Administration Flood Insurance Rate Map. Exh. 6, *Application*, see in particular Appendix 6.

⁸⁶ *Id.*

⁸⁷ Exh. 5, *Stipulation and Agreement*, p. 8; Transcript p. 43.

⁸⁸ The Signatories stipulate to these matters as being facts, but the issues encompassed by these particular stipulations involve mixed issues of fact and law. The Commission will make the legal determinations on these matters in the Conclusions of Law section of this Report and Order.

⁸⁹ Exh. 5, *Stipulation and Agreement*, p. 6; Transcript p. 43.

⁹⁰ Exh. 5, *Stipulation and Agreement*, p. 5; Transcript p. 43.

⁹¹ Exh. 5, *Stipulation and Agreement*, p. 6; Transcript p. 43.

⁹² Exh. 5, *Stipulation and Agreement*, p. 6; Exh. 6, *Application*, p. 11; Transcript p. 43. The Missouri Office of Administration has identified Cass County as one of the top five or six fastest growing counties in the State (based on percentage growth or absolute population growth, respectively) showing an aggregate population increase of 12.5% from 2000 to

60. The Agreement does not constitute a contract with the Commission. Acceptance of the Agreement by the Commission shall not be deemed as constituting an agreement on the part of the Commission to forego the use of any discovery, investigative or other power of the Commission. Nothing in the Agreement impinges upon or restricts in any manner the exercise by the Commission of any statutory right, including the right to access information, or any statutory obligation.

III. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

A. Jurisdiction, Authority, Requirement for a Hearing and Burden of Proof⁹³

1. Personal Jurisdiction

Section 386.020(15) defines "electrical corporation" as including: every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

Section 386.020(42) defines "public utility" as including "every . . . electrical corporation . . . as [this term is] defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

GMO is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (42), and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under

2005, and projecting a 24.8% increase from 2000 to 2010. See OA News Release (Apr. 25, 2008). *Id.*

⁹³ See Findings of Fact Numbers 1, 20-41 as they relate to this section.

Chapters 386 and 393 of the Missouri Revised Statutes.⁹⁴ The Commission has personal jurisdiction over GMO pursuant to these statutes, and, by the act of entering its appearance before the Commission, GMO submitted to the personal jurisdiction of the Commission.

2. Subject Matter Jurisdiction – The Application of Section 393.170

“[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto.”⁹⁵ Because the Commission is an administrative agency with limited jurisdiction, “the lawfulness of its actions depends directly on whether it has statutory power and authority to act.”⁹⁶ Subject matter jurisdiction is a tribunal’s statutory authority to hear a particular kind of claim.⁹⁷

GMO filed its application for a CCN pursuant to Section 393.170, which provides:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.
2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a

⁹⁴ Because GMO’s application involves a request for a CCN for electric facilities, the Commission cites to its specific jurisdiction over those facilities. However, GMO is also a “heating company” and “public utility” as defined in Sections 386.020(20) and (42) respectively, and is subject to the jurisdiction, supervision, control and regulation of the Commission, and all of its powers pursuant to Section 393.290 with regard to its steam heating service.

⁹⁵ *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943); *State ex rel. City of West Plains v. Public Serv. Comm’n*, 310 S.W.2d 925, 928 (Mo. banc 1958).

⁹⁶ *State ex rel. Gulf Transp. Co. v. Public Serv. Comm’n*, 658 S.W.2d 448, 452 (Mo. App. 1983).

⁹⁷ *In re Expungement of Arrest Records Related to Brown v. State*, 226 S.W.3d 147, 150 (Mo. banc 2007); *Burton v. Swann*, 258 S.W.3d 563, 567 (Mo. App. 2008).

certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Because KCPL is requesting the grant of a CCN pursuant to Section 393.170, which confers the power to grant that certificate to the Commission, the Commission has subject matter jurisdiction. No party disputes the Commission's subject matter jurisdiction over this matter.

3. Commission Authority – The Application of Section 393.171

As the Court of Appeals described in *State ex rel. Cass County v. Public Service*

Com'n.,⁹⁸ the permission and approval that may be granted pursuant to section 393.170 is of two types:

The PSC may grant CCNs for the construction of power plants, as described in subsection 1, or for the exercise of rights and privileges under a franchise, as described in subsection 2. Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two subsections of section 393.170. Permission to build transmission lines or production facilities is generally granted in the form of a "line certificate." See 4 CSR 240-3.105(1)(B). A line certificate thus functions as PSC approval for the construction described in subsection 1 of section

⁹⁸ 259 S.W.3d 544 (Mo. App. 2008).

393.170. Permission to exercise a franchise by serving customers is generally granted in the form of an “area certificate.” See 4 CSR 240-3.105(1)(A). Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170. (Internal citations omitted).⁹⁹

The clear language of Section 393.170 grants the Commission approval authority only if that authority is exercised prior to start of construction.¹⁰⁰ However, Section 393.171, RSMo Supp. 2008, which became effective on August 28, 2008, provides:

1. The commission shall have the authority to grant the permission and approval specified in section 393.170 after the construction or acquisition of any electric plant located in a first class county without a charter form of government has been completed if the commission determines that the grant of such permission and approval is necessary or convenient for the public service. Any such permission and approval shall, for all purposes, have the same effect as the permission and approval granted prior to such construction or acquisition. This subsection is enacted to clarify and specify the law in existence at all times since the original enactment of section 393.170.

2. No permission or approval granted for an electric plant by the commission under subsection 1 of this section, nor any special use permit issued for any such electric plant by the governing body of the county in which the electric plant is located, shall extinguish, render moot, or mitigate any suit or claim pending or otherwise allowable by law by any landowner or other legal entity for monetary damages allegedly caused by the operation or existence of such electric plant. Expenses incurred by an electrical corporation in association with the payment of any such damages shall not be recoverable, in any form

⁹⁹ *State ex rel. Cass County v. Public Serv. Comm'n.* 259 S.W.3d 544, 548-549 (Mo. App. 2008).

¹⁰⁰ *Id.* It should be noted that in *State ex rel. Cass County v. Public Serv. Comm'n.* the Court of Appeals did not hold that the Commission lacked subject matter jurisdiction pursuant to Section 393.170 when reversing the grant of the CCN to Aquila, Inc., but rather that it lacked authority pursuant to that section to grant a post-construction CCN. *Id.* at 550.

at any time, from the ratepayers of any such electrical corporation.

3. The commission's authority under subsection 1 of this section shall expire on August 28, 2009.

Cass County, where the facilities in question are located, is a first class county without a charter form of government. Consequently, the Commission has the authority to grant GMO a post-construction CCN for the South Harper power plant and the Peculiar substation, which are located in Cass County. No party disputes the Commission's authority to grant the requested CCN.

4. Requirement for a Hearing

Section 393.170.3 directs that any determination to grant a CCN shall follow a "due hearing."¹⁰¹ The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'.¹⁰² (Emphasis added.) The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence.¹⁰³

The Commission met its requirement for the hearing contemplated by Section 393.170 when it issued notice, allowed interested entities to intervene, and allowed an opportunity for any party to be heard on any identified issue in this matter. No party requested an evidentiary hearing or trial-type contested proceeding when given the opportunity. However, the Commission further ensured this statutory mandate was satisfied and provided additional process by convening an on-the-record presentation to allow all parties an opportunity to present their Agreement and address any questions the Commission had with regard to that Agreement.

5. Burden of Proof – Preponderance of the Evidence Standard

As petitioner, GMO has the burden of proving that CCNs for the Facilities are necessary or convenient for the public service. To carry its

¹⁰¹ Section 393.170.3; *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Serv. Comm'n of State of Mo.*, 776 S.W.2d 494, 495-496 (Mo. App. 1989).

¹⁰² *Id.*; See also 39A C.J.S. Hear, p. 632, et seq.

¹⁰³ *Id.*

burden, GMO must meet the preponderance of the evidence standard.¹⁰⁴ And in order to meet this standard, GMO must convince the Commission it is "more likely than not" that the grant of the CCN is necessary or convenient for the public service.¹⁰⁵

B. Commission Standards for Approval of the Grant of a Certificate

1. Statutory Standards

Section 393.170 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."¹⁰⁶ The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would

¹⁰⁴ "The general standard of proof for civil cases is preponderance of the evidence." *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007). See *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003) (stating that the burden of proof in "ordinary civil cases" is "preponderance of the evidence"). See also *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979). The function of the standard of proof is to "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Id.*

¹⁰⁵ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109-111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992). Preponderance is the minimum standard in civil disputes. *Rodriguez*, 936 S.W.2d at 109-111, citing to, *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982). The burden of proof has two parts: the burden of production and the burden of persuasion. The burden of production requires GMO to introduce enough evidence on the material issue or issues to have that issue or those issues decided by the Commission, rather than the Commission deciding against GMO in a peremptory ruling such as a summary determination or a determination on the pleadings. *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 745 (Mo. App. 2005); *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001); *State v. Ramires*, 152 S.W.3d 385, 395 (Mo. App. 2004). The burden of persuasion requires GMO to convince the Commission to favor its position, *Id.* and this burden always remains with GMO. *Middlemas v. Director of Revenue, State of Missouri*, 159 S.W.3d 515, 517 (Mo. App. 2005); *R.T. French Co. v. Springfield Mayor's Comm'n on Human Rights and Community Relations*, 650 S.W.2d 717, 722 (Mo. App. 1983).

¹⁰⁶ Section 393.170; *St. ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Webb Tri-State Gas Co. v. Public Serv. Comm'n*, 452 S.W.2d 586, 588 (Mo. App. 1970); *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

be an improvement justifying its cost,"¹⁰⁷ and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.¹⁰⁸ It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.¹⁰⁹

2. The "Intercon" or "Tartan" Factors

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide electric service, and while Section 386.171 extends that authority to facilities that are already constructed, neither statute provides guidance as to any specific criteria that must be satisfied prior to the grant of such certificates. Moreover, pursuant to Section 393.170.3, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.

The Commission has articulated the filing requirements for electric utility CCNs in Commission Rule 4 CSR 240-3.105, and the specific criteria to be used when evaluating applications of electric utility CCNs are more clearly set out in the case *In Re Empire District Electric Company*, 2000 WL 228658 (Mo. P.S.C.).¹¹⁰ Those criteria are commonly referred to as the "Intercon"¹¹¹ or "Tartan"¹¹² factors because of the prior cases articulating them, and they are as follows: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public

¹⁰⁷ *Id.*; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

¹⁰⁸ *Id.* *Beaufort Transfer Co.*, 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

¹⁰⁹ *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra*, quoting *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

¹¹⁰ See Report and Order issued December 7, 1999, Effective December 17, 1999. Also cited as *In The Matter of the Application of the Empire District Electric Company for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain an Electric Transmission and Distribution System to Provide Electric Service in an Area in Greene County, Missouri*, Case No. EA-99-172. See also *In re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991).

¹¹¹ *In re. Tartan Energy Company*, 3 Mo. P.S.C.173 (1994).

¹¹² *In re. Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554 (1991).

interest.¹¹³

3. Public Interest Defined

Evaluating part five of the *Intercon* factors necessarily requires determining what constitutes the “public interest.” “The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.”¹¹⁴ “[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.”¹¹⁵ The General Assembly of the State of Missouri many years ago, by enactment of the Public Service Commission Law (now Chapter 386), wisely concluded that the public interest would best be served by regulating public utilities.¹¹⁶ The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission’s authority.

The public interest is a matter of policy to be determined by the Commission.¹¹⁷ It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.¹¹⁸ Determining what is in the interest of the public is a

¹¹³ *Id.* See also Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173, 177 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.); Report and Order, *In re Missouri Gas Energy, a Division of Southern Union Company*, Case No. GA-2007-0289, 2008 WL 506279 (Mo. P.S.C.).

¹¹⁴ *In re Rahn’s Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (Mo. 1926).

¹¹⁵ *Morrishead v. Railways Co.*, Mo. 121 165, 96 S.W. 261, 271 (Mo. banc 1907).

¹¹⁶ *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974).

¹¹⁷ *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

¹¹⁸ *State ex rel. Intercon Gas, Inc. v. Public Service Com’n of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

balancing process.¹¹⁹ In making such a determination, the total interests of the public served must be assessed.¹²⁰ This means that some of the public may suffer adverse consequences for the total public interest.¹²¹ Individual rights are subservient to the rights of the public.¹²² The “public interest” necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

C. Application of the Statutory Standards and *Intercon* or *Tartan* Factors¹²³

1. The Need for Electric Service

The undisputed facts demonstrate that the location for the Facilities was selected because of the rapid growth occurring in Cass County and the increase in demand for electricity in this portion of GMO’s service area. Moreover, this need for capacity and energy from the Facilities was borne out after the Facilities were put into operation. In addition to increased demands for generation, there was a need to upgrade the 69 kV transmission system serving the Grandview, Belton, Harrisonville and Pleasant Hill areas in Cass County.

No party contested the need for the electric service in this portion of GMO’s service area, and there is no controverting evidence in the record to weigh against the conclusion that the service provided by these Facilities is needed to serve the public. The Signatories to the Agreement affirmatively stated that the Facilities are necessary and convenient for the public service. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that the electric service provided by GMO’s Facilities is needed.

2. GMO’s Financial, Technical and Managerial Ability to Provide Electric Service

The undisputed facts demonstrate that GMO has the financial, technical and managerial ability to provide electric service in this portion of GMO’s service area. GMO, and its predecessors-in-interest, have been

¹¹⁹ *In the Matter of Sho-Me Power Electric Cooperative’s Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *State ex rel. Mo. Pac. Freight Transport Co. v. Public Serv. Comm’n*, 288 S.W.2d 679, 682 (Mo. App. 1956).

¹²³ See Findings of Fact Numbers 20-52 as they relate to this section.

engaged in providing electrical service to Cass County, Missouri, since 1917. The Facilities have been serving the demands of GMO's customers since 2005, and the Facilities have been operated safely and responsibly to provide reliable service to GMO's customers.

The selection of the site for the Facilities ensured adequate sources of fuel transmission and supply to the Facilities and allowed for effective transmission of the generated power, as well as for future upgrading of the transmission lines. The site also made for easy access to the process and potable water capacity required for the Facilities.

No party contested GMO's financial, technical and managerial ability to provide electric service, and there is no controverting evidence in the record to weigh against the conclusion that GMO has the financial, technical and managerial ability to provide electric service by use of the Facilities. The Signatories to the Agreement affirmatively stated that GMO has the financial, technical and managerial ability to provide electric service by use of the Facilities. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that GMO has the financial, technical and managerial ability to provide this electric service.

3. Economic Feasibility

The undisputed facts demonstrate that GMO's predecessors financed the construction of the South Harper Facility with \$140 million of tax-advantaged revenue bonds issued under the economic development authority of the City of Peculiar. The Facilities provide sufficient additional service to justify their cost, and the inconvenience of GMO not having them is sufficient to arise to the level of them being necessities. Furthermore, no party has adduced any evidence that the Facilities were not economically feasible for GMO's operations. The Signatories to the Agreement affirmatively stated that the Facilities are economically feasible and currently provide reliable service. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that the Facilities are economically feasible.

4. Service Quality

The undisputed facts demonstrate that the Facilities were incorporated into Southwest Power Pool's transmission expansion plan, and now provide consumers with greater access to generation resources in the region. Additionally, the Facilities relieve the load on other transmission facilities in southern Kansas City and enhance the overall operation and reliability of the transmission system in that area.

No party has contested the enhanced service quality that resulted from the addition of these Facilities and no controverting evidence exists in this record to weigh against the conclusion that the Facilities have improved service quality and reliability for GMO's customers and have improved the overall efficiency and economics of GMO's transmission operations. The Signatories to the Agreement stipulated to these facts and affirmatively stated that the Facilities are necessary and convenient for the public service and in the public interest. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that the Facilities enhance the overall operation and reliability of the transmission system in southern Kansas City.

5. The Public Interest

The undisputed facts demonstrate that the South Harper Plant and the Peculiar Substation are each improvements that provide sufficient additional service to justify their cost, and GMO's and their customers' inconvenience of not having them is sufficient to arise to the level of them being necessities. GMO needs the 315 MW of generation capacity at the South Harper Plant (three 105 MW units) to provide reliable service to its native load customers. The Facilities have improved the reliability of the transmission system, have improved the overall efficiency and economics of transmission operations, and today provide reactive power to control voltage on the transmission network. And as previously noted, the Signatories to the Agreement affirmatively stated that the Facilities are necessary and convenient for the public service and in the public interest. Therefore, the Commission concludes the substantial and competent evidence in the record as a whole establishes that granting GMO certificates of convenience and necessity for the Facilities is in the public interest. GMO has met its burden by the preponderance of the evidence that the grant of CCNs for these Facilities is in the public interest.

D. Local Regulatory Requirements¹²⁴

372. The substantial and competent evidence on the record as a whole demonstrates that: (1) GMO has acquired all necessary local, state and national permits for construction of the Facilities, and (2) all required local zoning permits for construction, maintenance and operation of the Facilities. Additionally, the record confirms that all private claims and lawsuits relating either to the South Harper Plant or the Peculiar Substation

¹²⁴ See Findings of Fact Numbers 53-57 as they relate to this section.

have been resolved or settled.

E. Requested Waiver of 4 CSR 240-3.105(1)(B)2

GMO requests a waiver from the requirement of Commission Rule 4 CSR 240-3.105(1)(B)2, that it submit a study containing the plans and specifications for the Project and the estimated cost of construction. In its Application, GMO represented that it was prepared to make these materials available to the Commission, and any party to this matter, at a mutually agreeable location as those materials are extremely voluminous and burdensome to reproduce or electronically submit on the Commission's Electronic Filing & Information System ("EFIS"). GMO also claims waiver of this requirement is particularly appropriate since the actual construction costs of the South Harper Facility and Peculiar Substation are known.¹²⁵ Moreover, the Signatories to the Agreement affirmatively stated that because the Facilities are already constructed, GMO should be granted a variance from the requirement of 4 CSR-240-3.105(1)(B)(2).¹²⁶

The Commission concludes that the substantial and competent evidence in the record establishes good cause for granting a waiver of Commission Rule 4 CSR-240-3.105(1)(B)(2).¹²⁷ Good cause exists because the actual costs of constructing the Facilities, and the methods employed to finance the construction, are already known. The Facilities have already been constructed and are in operation.

F. Contingent Terms of the Stipulation and Agreement

373. In addition to stipulating to many facts regarding GMO's request and agreeing that the Facilities at issue are necessary and convenient for the public service and in the public interest, the Signatories to the Agreement have agreed to be bound by certain conditions in the event the Commission accepts the specific terms of the Agreement. For example, if approved and adopted by the Commission, except as specified within the Agreement, the Signatories shall not be prejudiced, bound by, or in any way affected by the terms of the Agreement: (i) in any future proceeding; (ii) in any proceeding currently pending under a separate docket; or (iii) in this proceeding should the Commission decide not to approve this Agreement or in any way condition its approval of the Agreement.¹²⁸ Additionally, if approved and adopted by the Commission, the Agreement shall constitute a binding

¹²⁵ Exh. 6, *Application*, p. 10.

¹²⁶ Exh. 5, *Stipulation and Agreement*, p. 9; Transcript p. 43.

¹²⁷ Commission Rule 4 CSR 240-2.015.

¹²⁸ Exh. 5, *Stipulation and Agreement*, p. 10-12.

agreement among the Signatories who shall cooperate in defending the validity and enforceability of the Agreement and the operation of the Agreement according to its terms.¹²⁹ The provisions of the Agreement are interdependent. In the event that the Commission does not approve and adopt the terms of the Agreement in total, or approves the Agreement with modifications or conditions that a Signatory objects to, it shall be void and no Signatory shall be bound, prejudiced, or in any way affected by any of the agreements or its provisions.¹³⁰

374. The Signatories also agreed that by entering the Agreement none of them shall be deemed to have approved or acquiesced in any question of Commission authority, accounting authority order principle, cost of capital methodology, capital structure, decommissioning methodology, ratemaking principle, valuation methodology, cost of service methodology or determination, depreciation principle or method, rate design methodology, jurisdictional allocation methodology, cost allocation, cost recovery, or question of prudence that may underlie this Agreement or for which provision is made in this Agreement.¹³¹ Further, if the Commission approves the Agreement without modification or condition, the Signatories agree to waive their respective rights to call, examine and cross-examine witnesses, pursuant to Section 536.070(2); their respective rights to present oral argument and written briefs pursuant to Section 536.080.1; their respective rights to seek rehearing, pursuant to Section 386.500; and their respective rights to judicial review pursuant to Section 386.510.¹³² The Signatories also agreed that this waiver applies only to a Commission Report and Order respecting this Agreement issued in this proceeding, and does not apply to any matters raised in any subsequent Commission proceeding, or any matters not explicitly addressed by this Agreement.¹³³

The Commission concludes that none of these provisions to the Agreement are contrary to any statute or rule, or in any way violative of the public interest.

G. Precedential Effect

An administrative body, that performs duties judicial in nature, is

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

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not and cannot be a court in the constitutional sense.¹³⁴ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.¹³⁵

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.¹³⁶ "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable."¹³⁷ The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.¹³⁸ "In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively."¹³⁹

¹³⁴ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

¹³⁵ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

¹³⁶ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 - 173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

¹³⁷ *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

¹³⁸ *Id.*

¹³⁹ *State ex rel. Gulf Transport Co. v. Public Serv. Comm'n*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Serv. Comm'n*, 366 S.W.2d 738,

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Final Decision

In making this decision, the Commission has considered the positions of all of the parties, the stipulated facts and all of the specific terms of the Agreement filed by the Signatories on January 9, 2009. Failure to specifically address a stipulated or undisputed fact or a specific position of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

GMO has met its burden of proof, by a preponderance of the evidence, that granting CCNs for the Facilities is required by the public convenience and necessity. With demand increasing in GMO's Missouri service area, including Cass County, and the need for year-around peaking capability, the South Harper Facility's three 105 MW simple-cycle CTs provide greater flexibility to meet the needs of the GMO's customers. Granting GMO's Application is in the public interest because the electrical power generated by the South Harper Facility will be rate-based capacity available to serve the increasing demand for electrical power GMO's customers,¹⁴⁰ and the Facilities improve the reliability of GMO's transmission system, improve the overall efficiency and economics of GMO's transmission operations, and provide reactive power to control voltage on the transmission network.

Indeed, all of the Signatories to the Agreement expressly agree that: (a) the exercise by GMO of the rights, privileges and franchises set forth in the Application with regard to the Facilities are

741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Serv. Comm'n*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); Sections 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

¹⁴⁰ The Commission has stated its preference for company-owned generation instead of heavy reliance on Purchase Power Agreements to meet Missouri load requirements and to protect Missouri customers. See *In re Ameren Generating Co.*, 108 FERC ¶ 61,081 at 61,405, Order 473 at Para. 27 (July 29, 2004).

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necessary and convenient for the public service, and in the public interest; (b) the Commission should grant GMO permission and approval to construct, install, own, operate, maintain, and otherwise control and manage the Facilities; and (c) pursuant to Sections 393.170 and 393.171, the Commission should issue GMO certificates of convenience and necessity regarding the Facilities.¹⁴¹ Consequently, the Commission shall approve the Agreement filed by the parties and grant GMO CCNs for the Facilities.

THE COMMISSION ORDERS THAT:

1. The unopposed Non-Unanimous Stipulation and Agreement filed on January 9, 2009, is hereby approved and adopted as a resolution of all factual issues in this case. A copy of the Non-Unanimous Stipulation and Agreement is attached to this order as Attachment A.

2. The Signatory Parties to the Stipulation and Agreement are ordered to comply with the terms of the Non-Unanimous Stipulation and Agreement.

3. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company a certificate of public convenience and necessity to construct, install, own, operate, maintain, and otherwise control and manage electrical power production and related facilities at the South Harper Facility consisting of three 105 MW natural gas-fired combustion turbines and an associated transmission substation, as well as all facilities, structures, fixtures, transformers, breakers, installations, and equipment related thereto now existing or to be constructed for the production and transmission of electrical power and energy at the following described location in Cass County, Missouri:

The Southeast Quarter (SE 1/4) of the Southeast Quarter (SE 1/4) of Section Twenty-Nine (29), and the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of Section Thirty-two (32), except that part deeded to Cities Service Gas Company by deed recorded in Book 398, Page 518, Recorder's Office, Cass County, Missouri, and except easements of record all in Township Forty-Five (45), Range Thirty-Two (32) containing approximately 74 acres at or near the intersection of 243rd Street and Harper Road.

4. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company a certificate of public

¹⁴¹ Exh. 5, *Stipulation and Agreement*, p. 8; Transcript p. 43.

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convenience and necessity to construct, install, own, operate, maintain, and otherwise control and manage the Peculiar Substation together with any and all other facilities, structures, fixtures, equipment and installations related thereto, now existing or to be constructed for the transmission of electrical power and energy at the following described location in Cass County, Missouri:

Beginning at the Northwest corner of the Northwest Quarter (NW 1/4) of Section Five (5), Township Forty-five North (45 N), Range Thirty-two West (32 W), Cass County, Missouri; Thence South along the West line of said NW 1/4 a distance of 2,508.18 feet more or less to the South line of said NW 1/4; Thence East along said South line a distance of 1320 feet; Thence North parallel with said West line a distance of 1320 feet; Thence West parallel with said South line a distance of 570 feet; Thence Northwesterly 1240 feet more or less to a point on the North line that is 400 feet East of said Northwest corner; Thence West along said North line a distance of 400 feet to the Point of Beginning containing approximately 55 acres one-half mile west of 71 Highway and one-half mile south of the intersection of 203rd Street and Knight Road.

5. The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company a waiver from the requirement of 4 CSR 240-3.105(1)(B)2.

6. Nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions or facilities herein involved. This order has no ratemaking effect.

7. This order does not limit any Signatory to the Non-Unanimous Stipulation and Agreement from asserting in a case where KCP&L Greater Missouri Operations Company's rates are at issue that KCP&L Greater Missouri Operations Company should have constructed one or more additional generating units at the South Harper Plant, or that Dogwood Energy, L.L.C.'s plant remains available as a source of generating capacity for KCP&L Greater Missouri Operations Company.

8. This order, approving the unopposed Non-Unanimous Stipulation and Agreement filed on January 9, 2009, shall not be interpreted or construed in this or any other proceeding, administrative or judicial, as an amendment, alteration, modification or waiver of any of the terms, conditions, provisions, rights, obligations and duties set forth in

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the Memorandum of Agreement entered into on April 21, 2008, as amended, by and between Cass County and the Company.

9. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.

10. This Report and Order shall become effective on March 28, 2009.

11. This case shall be closed on March 29, 2009.

Clayton, Chm., Murray, Davis, Jarrett
and Gunn, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

**In the Matter of Laclede Gas Company's Tariff Designed to Permit
Early Implementation of Cold Weather Rule Provision and to Permit
Laclede to Collect Bad Debt Through the PGA***

*File No. GT-2009-0026
Decided April 15, 2009*

Gas §17.1. Laclede's tariff that would allow the company to recover the portion of its bad debt expense ascribed to gas costs through its PGA clause is unlawful in that it would allow Laclede to recover bad debt expense in a manner that would constitute forbidden single-issue ratemaking.

Gas §17.1. Laclede's bad debt expense is not a gas cost such as can be recovered through the PGA clause.

APPEARANCES

Michael C. Pendergast, Vice President and Associate General Counsel,
and **Rick Zucker**, Assistant General Counsel - Regulatory, Laclede Gas
Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101;
For Laclede Gas Company.

Kevin A. Thompson, General Counsel, and **Lera L. Shemwell**, Deputy
General Counsel, P.O. Box 360, 200 Madison Street, Jefferson City,
Missouri 65102
For the Staff of the Missouri Public Service Commission.

*This case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 328
SW3d 316. (Mo. App. WD 2010)

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Mark D. Poston, Senior Public Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102
For the Office of the Public Counsel and the Public.

DEPUTY CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On July 9, 2008, Laclede Gas Company filed a tariff revision that would modify the company's purchased gas adjustment (PGA) mechanism to allow Laclede to recover the gas cost portion of its bad debt write-offs from its customers through the PGA mechanism.¹ On July 17, the Office of the Public Counsel filed a motion opposing Laclede's proposal to include bad debt amounts in the PGA and asking the Commission to suspend the tariff. The Commission's Staff filed its own motion on July 22, in which it asks the Commission to suspend or reject Laclede's tariff.

Laclede's tariff carried an effective date of August 8. On August 5, the Commission issued an order suspending the tariff until December 6. Following a prehearing conference, the Commission, on August 28, adopted a procedural schedule proposed by the parties, and extended its suspension of the tariff for an additional six months, until June 6, 2009.

In compliance with the established procedural schedule, the parties prefiled direct, rebuttal, and surrebuttal testimony. The Commission conducted an evidentiary hearing on January 5, 2009. The parties, filed initial post-hearing briefs on February 13, followed by reply

¹ Laclede's tariff would also have implemented certain provisions of the Commission's cold weather rule in advance of the winter heating season. Those provisions have been rendered moot by the passage of time while the tariff has been suspended, and the parties agree they do not need to be further addressed in this Report and Order.

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briefs, on February 27. In addition, the Missouri Energy Development Association (MEDA) filed an amicus brief on February 13.

Findings of Fact

Laclede proposes to modify its PGA tariff to allow for the recovery of what Laclede describes as the gas cost portion of its bad debt expense. To understand what that proposed modification would do, it is necessary to first understand how Laclede currently recovers its cost of bad debt, and second, to understand how the PGA tariff works.

Laclede, like any other business, has customers who either cannot or will not pay their bills. After a customer's account with Laclede is unpaid for six months, the company writes that account balance off as uncollectible, in other words, bad debt.² Bad debt is a legitimate cost of doing business, for which a utility is generally allowed to seek recovery from its customers through rates established by this Commission.

Currently, Laclede is able to recover its bad debt expense through its base rates. As part of an overall rate case, the Commission determines the amount of bad debt expense the utility is likely to incur. The Commission then considers that amount of bad debt expense, along with the other expenses and revenues of the utility when establishing a rate that will allow the utility an opportunity to recover its cost of service from its customers.³

The amount the Commission chooses to allow Laclede to recover for bad debt expense through a rate case is, however, just an estimate of what those expenses will be. If the actual level of bad debt rises above the amount allowed in the rate case, Laclede runs the risk of under recovering its costs. Conversely, if bad debt levels drop below the amount allowed in the rate case, Laclede would be able to keep the extra revenue resulting from the over recovery of its costs. Laclede's proposal would relieve the company of a part of the risk of over or under recovery of bad debt expenses by allowing the company to recover part of those expenses from ratepayers through the existing PGA mechanism.

The PGA mechanism allows Laclede to recover the costs it incurs to purchase natural gas, as well as certain other gas related costs, from its customers by means of a separate charge on the customer's bill. Laclede can change the amount of that PGA charge several times throughout the year to reflect changes in the amount it must pay to purchase and transport natural gas over the interstate pipelines to serve

² Transcript, Page 78, Lines 1-14.

³ Buck Direct, Ex. 3, Page 3, Lines 5-20.

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its customers. Laclede's PGA charges are subject to an Actual Cost Adjustment (ACA) by which Staff reviews the company's gas purchases for prudence and adjusts the company's rates to ensure those gas costs are simply passed through to customers dollar for dollar. Roughly 75 percent of the costs included in a customer's bill are related to gas costs and thus are flowed through the PGA.⁴

Laclede recovers its non-gas related costs through base rates and those costs are not passed through the PGA mechanism. Base rates are designed to allow the company to recover its investment, as well as operating and maintenance costs it incurs to deliver gas through its distribution system to a customer's home or business.⁵ Unlike PGA rates, Laclede can change its base rates only by filing a rate case.

Currently, Laclede recovers its bad debt expense through its base rates. However, Laclede's proposed tariff would allow it to recover a portion of its bad debt expense through the PGA mechanism. To justify this change, Laclede claims a portion of its bad debt expense is really a gas cost and would include that gas cost portion of its bad debt expense for recovery through the PGA mechanism. Since approximately 75 percent of a customer's bill is for recovery of gas costs, Laclede would assume that approximately 75 percent of its bad debt expense is related to its gas cost and would recover that 75 percent of its bad debt expense through the PGA rather than through base rates.

The recovery mechanism described in Laclede's tariff is, however, more complicated than would be necessary to simply ascribe 75 percent of bad debt expense to gas costs to be recovered through the PGA. The added complexity is necessary because Laclede is proposing this tariff change outside of a general rate case. In Laclede's last rate case, File No. GR-2007-0208, some amount was included in Laclede's base rates to reflect the company's bad debt expense. If Laclede were allowed to simply recover 75 percent of its bad debt expense through the PGA, it would double recover all, or at least a part of the amount of bad debt expense included in base rates in the last rate case.

In an attempt to get around that double recovery problem, Laclede would assume that \$8.1 million are already included in base rates for recovery of the gas cost portion of bad debt, and would track fluctuations above and below that amount for recovery or refund through the PGA mechanism. However, Laclede's last rate case was resolved

⁴ Cline Direct, Ex. 1, Page 4, Lines 12-14.

⁵ Cline Direct, Ex. 1, Page 3, Lines 10-20.

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through a stipulation and agreement among the parties. That stipulation and agreement was a “black box” settlement in which the parties simply agreed upon an overall amount that Laclede should be able to recover, but did not reach an agreement on the amount of any specific component of that settlement amount. As a result, there was no specific level of bad debt included in that stipulation and agreement.⁶

Laclede’s proposed tariff would allow it to recover a portion of its bad debt expense through the PGA mechanism on the assumption that such bad debt expense is a merely another aspect of the company’s cost to purchase natural gas. However, bad debt expense is not a part of Laclede’s cost to purchase gas. Laclede does not make a payment to anyone when it incurs bad debt, rather it merely makes an accounting entry to recognize a loss of revenue.⁷ An increase or decrease in Laclede’s level of bad debt has no effect on the amount its wholesale gas suppliers charge Laclede for the natural gas it purchases.⁸ Simply put, bad debt is not a gas cost.⁹

This distinction is important because, as will be explained more fully in the Conclusions of Law section of this Report and Order, the only costs a gas utility can recover through the PGA are those costs over which the utility does not exercise substantial control. Laclede’s current PGA tariff allows it to recover the commodity and related transportation costs it must incur to obtain the natural gas it supplies to its customers. When it incurs those gas costs, Laclede must pay the price established by a national and international market over which Laclede can exercise little or no control.¹⁰

In contrast, Laclede can exercise substantial influence over the level of bad debt expense it recognizes on its balance sheet by being more or less aggressive in its collection efforts.¹¹ For example, Laclede could be more aggressive in following through with disconnection of customers who fail to pay their bills.¹² Similarly, Laclede can use collection tools such as social security number identification to prevent customers from presenting a fraudulent identity to obtain service, customer security deposits, and can use collection agencies, to obtain

⁶ Transcript, Page 44, Lines 20-25.

⁷ Transcript, Page 72, Lines 3-9.

⁸ Transcript, Page 77, Lines 3-12.

⁹ Solt Rebuttal, Ex. 8, Page 4, Line 19.

¹⁰ Transcript, Page 60, Lines 1-5.

¹¹ Transcript, Page 42, Lines 2-5.

¹² Transcript, Pages 158-159, Lines 8-25, 1-2.

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payment of bills.¹³

Of course, Laclede cannot completely control the level of bad debt expense it must incur. The level of bad debt is also influenced by factors outside Laclede's control, such as natural gas prices, weather, levels of available energy assistance, and the general economy.¹⁴ Furthermore, Laclede's ability to aggressively collect bad debt is limited by Commission rules, such as the Cold Weather Rule, which are designed to allow consumers a greater ability to retain gas service, even when they are having difficulty paying their bills.¹⁵ Nevertheless, bad debt expense is of a different character than gas expenses that are currently passed through to customers under the PGA mechanism. The impact of that difference will be further discussed in the Conclusions of Law section.

Conclusions of Law

1. Laclede is a gas corporation and a public utility, as those terms are defined by Section 386.020(18) and (43), RSMo Supp. 2008. As such, the Commission has jurisdiction over Laclede pursuant to Sections 386.250(1), RSMo 2000, and 393.140, RSMo 2000.

2. Section 393.150, RSMo 2000 allows the Commission to suspend a tariff filed by a gas utility for 120 days, plus six months, beyond the date the tariff would otherwise become effective.

3. Laclede's current PGA mechanism is established in the company's tariff. The Commission first approved a PGA tariff for Laclede in a report and order issued in 1962.¹⁶

4. Section 393.270.4, RSMo 2000 provides: [i]n determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question ... "

5. Missouri's courts have interpreted the provision of Section 393.270(4) that allows the Commission to consider all facts in setting rates, as requiring the Commission to consider "all relevant factors" when setting rates.¹⁷

6. In the 1979 *Utility Consumers Council of Missouri*

¹³ Kremer Rebuttal, Ex. 7, Page 5, Lines 3-13.

¹⁴ Cline Direct, Ex. 1, Page 5, Lines 7-20.

¹⁵ Kremer Rebuttal, Ex. 7, Pages 5-6, Lines 16-22, 1-10. The applicable Commission rules are found in 4 CSR 240.13 (Chapter 13).

¹⁶ *In the Matter of the Application of Laclede Gas Company to Put into Effect a Purchased Gas Adjustment Clause*, 10 MO P.S.C. (N.S.) 442 (1962).

¹⁷ *State ex rel. Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56 (Mo banc 1979)

decision,¹⁸ the Missouri Supreme Court struck down a Commission decision that allowed electric utilities to recover their fuel costs through operation of a fuel adjustment clause. In doing so, the court held that a fuel adjustment clause would violate the statutory prohibition against single-issue ratemaking, in part because such a clause would alter rates without a consideration of “all relevant factors”.¹⁹

7. The fuel adjustment clause for electric utilities the *Utility Consumers Council of Missouri* court found to be contrary to Missouri statutes is similar to the PGA clause utilized by Missouri’s natural gas distribution companies, including Laclede. Not surprisingly, a few years after the *Utility Consumers Council of Missouri* decision, the legality of PGA clauses for gas utilities was also challenged.

8. In the *Midwest Gas Users’ Association* case,²⁰ the Court of Appeals distinguished the *Utility Consumers Council of Missouri* decision, finding that the nature of the gas costs passed to consumers under the PGA were fundamentally different from the electric costs that would have been passed to consumers of electricity under the rejected fuel adjustment clause.

9. In finding that the challenged PGA clause did not constitute improper single-issue ratemaking, the *Midwest Gas Users’ Association* court held that the cost of purchasing natural gas could be treated differently because natural gas is “a natural resource, not a product which must be produced with labor and materials.”²¹ As such, the gas utility cannot exercise meaningful control over the price it must pay for natural gas, and cannot offset those costs by implementing cost savings in other areas. In that way, the *Midwest Gas Users’ Association* court found that natural gas costs passed through to customers under the PGA were akin to tax costs the Missouri Supreme Court allowed to be passed through to customers in a 1960 case, *Hotel Continental v. Burton*.²² Thus, if Laclede’s bad debt costs are to be passed through the PGA they must be similar to the natural gas costs that were approved in *Midwest Gas Users’ Association*, and not similar to the costs rejected in *Utility Consumers Council of Missouri*.

¹⁸ Id.

¹⁹ Subsequently, in 2005, the General Assembly passed legislation that allowed electric utilities an opportunity to implement fuel adjustment clauses. That legislation is codified at Section 386.266, RSMo Supp. 2008.

²⁰ *State ex rel. Midwest Gas Users’ Association v. Pub. Serv. Comm’n*, 976 S.W.2d 470 (Mo. App. W.D. 1998)

²¹ Id. at 480.

²² 334 S.W. 2d 75 (Mo. 1960).

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10. As the Commission explained in the findings of fact section of this report and order, Laclede's bad debt expense, which it seeks to recover under its PGA clause, is not a gas cost. Rather, Laclede can exercise substantial influence over the level of bad debt expense it recognizes on its balance sheet by being more or less aggressive in its collection efforts, subject to the limitations imposed by the Commission's regulations. In that way, Laclede's bad debt expense is more similar to the costs rejected in *Utility Consumers Council of Missouri*. As such, inclusion of those costs in the PGA is forbidden as single-issue ratemaking by the holding of the Supreme Court in *Utility Consumers Council of Missouri*.

Decision

Based on its findings of fact and conclusions of law, the Commission finds that Laclede's tariff that would allow Laclede to recover the portion of its bad debt expense ascribed to gas costs through its PGA clause is unlawful in that it would allow Laclede to recover bad debt expenses in a manner that would constitute improper single-issue ratemaking forbidden by the holding of the Missouri Supreme Court in *Utility Consumers Council of Missouri*. Furthermore, the Commission finds that Laclede's bad debt expense is not a gas cost such as can be recovered through the PGA under the exception to the single-issue ratemaking prohibition recognized by the *Midwest Gas Users' Association* decision. Therefore, the Commission must reject Laclede's tariff.

Staff and Public Counsel also challenged Laclede's tariff by arguing that even if bad debt expenses could otherwise be recovered through the PGA, the company could not modify its PGA tariff outside of a general rate case, and that even if it were legally able to recover its bad debt expense through its PGA tariff, it would be bad public policy to allow Laclede to do so. Because the Commission has found that Laclede cannot legally recover its bad debt expense through its PGA tariff, it will not reach the other proposed grounds for rejecting the tariff.

IT IS ORDERED THAT:

1. The tariff sheets filed by Laclede Gas Company on July 9, 2008, and assigned tariff number JG-2009-0033, are rejected.
2. This report and order shall become effective on April 25, 2009.

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Clayton, Chm., Murray, Davis, Jarrett,
and Gunn, CC., concur.

NOTE: Another order in this case can be found at page 517.

**In the Matter of the 2008 Resource Plan of Kansas City Power &
Light Company Pursuant to 4 CSR 240-22**

*Case No. EE-2008-0034
Decided April 22, 2009*

Electric §40. Kansas City Power & Light Company (hereafter “KCP&L”) filed its integrated resource plan (IRP), as required by 4 CSR 240 – Chapter 22. The purpose of the Commission’s integrated resource planning rule is to require Missouri’s electric utilities to undertake an adequate planning process to ensure that the public interest in a reasonably priced, reliable, and efficient energy supply is protected.

Electric §42. Commission Rule 4 CSR 240-22.010(1) provides that a Commission finding that a utility is in compliance with its Integrated Resource Plan rules is not to be construed as Commission approval of the utility’s resource plans, resource acquisition strategies or investment decisions.

**ORDER APPROVING NONUNANIMOUS STIPULATION AND
AGREEMENT AND ACCEPTING INTEGRATED RESOURCE PLAN**

Kansas City Power & Light Company (hereafter “KCP&L”) filed its integrated resource plan (IRP), as required by 4 CSR 240 – Chapter 22, on August 5, 2008. On April 9, 2009, KCP&L, the Staff of the Commission (hereafter “Staff”), the Office of the Public Counsel (hereafter “OPC”), the Missouri Department of Natural Resources (hereafter “MDNR”), and Dogwood Energy, LLC (hereafter “Dogwood”), filed a non-unanimous stipulation and agreement that purports to resolve all alleged deficiencies in the filing.

Praxair, Inc., (hereafter “Praxair”) did not sign the stipulation and agreement. However, Commission Rule 4 CSR 240-2.115 provides that if no party objects to a non-unanimous stipulation and agreement within seven days of its filing, the stipulation and agreement may be treated as unanimous. No party objected within the seven days. Since no party has filed a timely objection to the stipulation and agreement, it will be treated as a unanimous agreement.

The purpose of the Commission’s integrated resource planning

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rule is to require Missouri's electric utilities to undertake an adequate planning process to ensure that the public interest in a reasonably priced, reliable, and efficient energy supply is protected. Commission Rule 4 CSR 240-22.080(13) requires that after considering an electric utility's IRP filing, the Commission issue an order containing findings that the filing "either does or does not demonstrate compliance with the requirements of this chapter, and that the utility's resource acquisition strategy either does or does not meet the requirements stated in 4 CSR 240-22.010(2)(A)-(C)."¹ Furthermore, 4 CSR 240-22.010(1) provides that a Commission finding that a utility is in compliance with these rules

¹ 4 CSR 240-22.010(2) provides as follows:

(2) The fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe reliable and efficient, at just and reasonable rates, in a manner that serves the public interest. This objective requires that the utility shall –

(A) Consider and analyze demand-side efficiency and energy management measures on an equivalent basis with supply-side alternatives in the resource planning process;

(B) Use minimization of the present worth of long-run utility costs as the primary selection criterion in choosing the preferred resource plan; and

(C) Explicitly identify and, where possible, quantitatively analyze any other considerations which are critical to meeting the fundamental objective of the resource planning process, but which may constrain or limit the minimization of the present worth of expected utility costs. The utility shall document the process and rationale used by decision makers to assess the tradeoffs and determine the appropriate balance between minimization of expected utility costs and these other considerations in selecting the preferred resource plan and developing contingency options. These considerations shall include, but are not necessarily limited to, mitigations of –

1. Risks associated with critical uncertain factors that will affect the actual costs associated with alternative resource plans;

2. Risks associated with new or more stringent environmental laws or regulations that may be imposed at some point within the planning horizon; and

3. Rate increases associated with alternative resource plans.

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is not to be construed as Commission approval of the utility's resource plans, resource acquisition strategies or investment decisions.

Based on the unopposed stipulation and agreement, the Commission finds that KCP&L's 2008 IRP filing, as modified and clarified by the stipulation and agreement, demonstrates compliance with the requirements of Commission Rule 4 CSR 240-22. Furthermore, the Commission finds that KCP&L's resource acquisition strategy described in its 2007 IRP filing meets the requirements stated in Commission Rule 4 CSR 240-22.010(2)(A)-(C). Finally, the Commission finds that the stipulation and agreement filed by the parties is consistent with the public interest and shall be approved.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement filed on April 9, 2009, is approved and the signatory parties are ordered to comply with its terms.
2. Kansas City Power & Light Company's 2008 integrated resource plan is accepted as being in compliance with Commission Rule 4 CSR 240 – Chapter 22.
3. The Commission's acceptance of this integrated resource plan does not indicate Commission approval of the utility's resource plan, resource acquisition strategies or investment decisions.
4. This order shall become effective on May 2, 2009.
5. This case shall be closed on May 3, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Pridgin, Senior Regulatory Law Judge

Note: The stipulation and agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Laclede Gas Company's Tariff Designed to Permit Early Implementation of Cold Weather Rule Provision and to Permit Laclede to Collect Bad Debt Through the PGA*

File No. GT-2009-0026
Decided April 29, 2009

Evidence, Practice and Procedure §27. The Commission denied an application for rehearing that restated positions the Commission previously rejected in its report and order.

*This case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 328 SW3d 316. (Mo. App. WD 2010)

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ORDER DENYING APPLICATION FOR REHEARING

On April 15, 2009, the Commission issued a report and order rejecting Laclede Gas Company's tariff that would have allowed Laclede to recover the portion of its bad debt expense ascribed to gas costs through its Purchased Gas Adjustment clause. By its terms, that report and order became effective on April 25. On April 24, Laclede filed a timely application for rehearing, contending the Commission should rehear its order rejecting Laclede's tariff and instead approve that tariff as part of Laclede's next rate case.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefore be made to appear." Laclede's application for rehearing merely restates the arguments the Commission rejected in its report and order. The Commission finds no reason to grant rehearing.

THE COMMISSION ORDERS THAT:

1. The Application for Rehearing filed by Laclede Gas Company is denied.
2. This order shall become effective on April 29, 2009.

Clayton, Chm., Murray, Davis, Jarrett,
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: Another order in this case can be found at page 507.

**In the Matter of Application of Kansas City Power & Light Company
for Approval of the Accrual and Funding of Wolf Creek Generating
Station Decommissioning Costs at Current Levels.**

File No. EO-2009-0072

Decided April 29, 2009

Electric §45. The Commission approved a stipulation and agreement regarding KCP&L's decommissioning fund for the Wolf Creek Generating Station and found that decommissioning expense accruals and trust fund payments should remain at current levels.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves the Unanimous Stipulation and Agreement between the Kansas City Power & Light Company, the Staff of the Commission, and the Office of the Public Counsel regarding KCP&L's funding for the decommissioning of its Wolf Creek Generating Station.

Commission rule 4 CSR 240-3.185 (3) states, in part, that:

On or before September 1, 1990, and every three years after that, utilities with decommissioning trust funds shall perform and file with the commission cost studies detailing the utilities' latest cost estimates for decommissioning their nuclear generating unit(s) along with the funding levels necessary to defray these decommissioning costs. These studies shall be filed along with appropriate tariff(s) effectuating the change in rates necessary to accomplish the funding required.

On August 29, 2008, KCP&L filed an application pertaining to Wolf Creek requesting that the Commission: (a) find that the 2008 Study satisfies the requirements of 4 CSR 240-3.185(3); (b) approve the 2008 decommissioning cost estimate of \$593,542,000; (c) approve the continuation of the annual accrual at the current level of \$1,281,264; and (d) find that the Wolf Creek decommissioning costs are included in KCP&L's current cost of service and are reflected in current rates for ratemaking purposes.

The Commission issued notice of the application, and allowed interested entities the opportunity to intervene. No applications to intervene were filed.

The Office of the Public Counsel, Staff, and KCP&L (collectively referred to as "the parties") filed a Unanimous Stipulation and Agreement on April 7, 2009. The parties requested that the Commission:

- Approve the Unanimous Stipulation and Agreement;
- Find that KCP&L's 2008 Cost Study satisfies the requirements of 4 CSR 240-3.185(3);
- Find that KCP&L shall continue its Missouri retail jurisdiction expense accruals and trust fund payments at the current level of \$1,281,264 without any change in its Missouri retail jurisdictional rates;
- Find that the annual decommissioning costs are included in KCP&L's cost of service and reflected in its current rates for ratemaking purposes;
- Authorize KCP&L to continue to record and preserve

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Wolf Creek asset retirement obligation costs, as agreed by the parties and authorized by the Commission in Case No. EU-2004-0294; and

- Direct that future quarterly reports required by 4 CSR 240-3.185(1), future annual reports required by 4 CSR 240-3.185(2), and the quarterly Nuclear Decommissioning Trust Fund Performance Report be filed in the Electronic Filing and Information System (EFIS) in a non-case related repository under the category "Nuclear Plant Decommissioning Reports" rather than being filed under the current case number.

The Commission has considered the verified application, the August 2008 Decommissioning Cost Analysis for the Wolf Creek Generating Station attached to the application, and the Unanimous Stipulation and Agreement. The Commission determines that the Unanimous Stipulation and Agreement should be approved. In doing so, the Commission finds that KCP&L's 2008 Cost Study satisfies the requirements of 4 CSR 240-3.185(3). In addition, the Commission finds that KCP&L's retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$1,281,264. The Commission also finds that the current decommissioning costs for Wolf Creek are included in KCP&L's current cost of service and are reflected in its current rates for ratemaking purposes.

THE COMMISSION ORDERS THAT:

1. The Unanimous Stipulation and Agreement filed by the Kansas City Power & Light Company, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel on April 7, 2009, is approved.
2. The parties shall comply with the terms of the Unanimous Stipulation and Agreement.
3. Kansas City Power & Light Company's retail jurisdiction annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$1,281,264.
4. The current decommissioning costs for Wolf Creek are included in Kansas City Power & Light Company's current cost of service and are reflected in its current rates for ratemaking purposes.
5. Kansas City Power & Light Company is authorized to continue to record and preserve Wolf Creek asset retirement obligation costs, as agreed by the Commission Staff, the Office of the Public

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Counsel, and the company and authorized by the Commission in Case No. EU-2004-0294.

6. Notwithstanding any other requirements of the Commission's rules to the contrary, future quarterly reports required by 4 CSR 240-3.185(1), future annual reports required by 4 CSR 240-3.185(2), and the quarterly Nuclear Decommissioning Trust Fund Performance Report shall be submitted to the Commission's Electronic Filing and Information System (EFIS) in a non-case related repository under the category "Nuclear Plant Decommissioning Reports" rather than being filed under the current case number.

7. This order shall become effective on May 9, 2009.

8. This file shall be closed on May 10, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

***NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**Application of Union Electric Company d/b/a AmerenUE for
Approval of Decommissioning Cost Estimate and Funding Level of
Nuclear Decommissioning Trust Fund**

File No. EO-2009-0081

Decided April 29, 2009

Electric §40. The Commission granted Ameren a variance from the filing requirements of rules 4 CSR 240-3.185(1) and (2) to allow the filing required by those rules to be made as non-case related submissions.

Electric §45. Ameren's retail jurisdictional annual decommissioning expense accruals and trust fund payment shall continue at the current level of \$6,486,378, are included in Ameren's current cost of service and are reflected in its current rates for ratemaking purposes.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves the Unanimous Stipulation and Agreement

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between the Union Electric Company, d/b/a AmerenUE, Staff of the Commission and the Office of the Public Counsel regarding AmerenUE's funding for the decommissioning of its Callaway nuclear power plant.

Commission rule 4 CSR 240-3.185(3) states, in part, that:

On or before September 1, 1990, and every three years after that, utilities with decommissioning trust funds shall perform and file with the commission costs studies detailing the utilities' latest cost estimates for decommissioning their nuclear generating unit(s) along with the funding levels necessary to defray these decommissioning costs. These studies shall be filed along with appropriate tariff(s) effectuating the change in rates necessary to accomplish the funding required.

On September 2, 2008, AmerenUE filed an application requesting that the Missouri Public Service Commission approve its cost estimate and current funding level of \$6,486,378 of its nuclear decommissioning trust fund. Ameren also requests that the Commission specifically find that the annual funding level contributed to the decommissioning trust fund is included in Ameren's current cost of service for rate-making purposes.

On April 23, 2009, the parties filed a Unanimous Stipulation and Agreement and requests that the Commission:

- Find that Ameren's retail jurisdiction annual decommissioning expense accrual and trust fund payments shall continue at the current level of \$6,486,378.
- Find, in order for the Callaway decommissioning fund to continue to utilize the sinking fund method of decommissioning funding, that the current decommissioning costs for Callaway are included in Ameren's current cost of service and are reflected in its current rates for ratemaking purposes.
- Recognize that Ameren's 2008 Cost Study meets the requirements of 4 CSR 240-3.185 (3).
- Grant Ameren variances from the filing requirements of rules 4 CSR 240-3.185 (1) and (2) to allow the filings required by those rules to be made as non-case related submissions under the EFIS category, Nuclear Plant Decommissioning Report for Union Electric Company d/b/a AmerenUE-Investor (Electric) and directing that Ameren file, on a prospective basis the quarterly reports required by 4 CSR 240-3.185 (1), the annual report required by 4 CSR

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240.3.185 (2) and the quarterly Nuclear Decommissioning Trust Fund Performance Reports in the Commission's EFIS as non-case related submissions, commencing with the next filing due after the effective date of this order.

- Approve, pursuant to 4 CSR 240-20.070(4)(C), the use of a jurisdictional demand allocator of 98.38%.

The Commission has reviewed the Unanimous Stipulation and Agreement and will approve it. In doing so, the Commission finds that Ameren's retail jurisdictional annual decommissioning expense accruals and trust fund payments shall continue at the current level of \$6,486,378. The Commission further finds that the current decommissioning costs for Callaway are included in Ameren's current cost of service and are reflected in its current rates for ratemaking purposes. The Commission also recognizes that Ameren's Costs Study meets the requirements of 4 CSR 240-2.185(3).

THE COMMISSION ORDERS THAT:

1. The Unanimous Stipulation and Agreement filed by Union Electric Company, d/b/a AmerenUE, Staff of the Commission and the Office of the Public Counsel regarding AmerenUE's funding for the decommissioning of its Callaway nuclear power plant is approved.
2. The parties shall comply with the terms of the Unanimous Stipulation and Agreement.
3. Union Electric Company, d/b/a AmerenUE is granted a variance from the requirements of 4 CSR 240-3.185(1) and (2) to file reports as case related filing and instead shall file those reports as non-case related submissions.
4. The use of a jurisdictional demand allocator of 98.38% is approved.
5. This order shall become effective on May 9, 2009.
6. This case shall be closed on May 10, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Line and a Distribution System to Provide Gas Service in Pettis and Benton Counties, Missouri, as a New Certificated Area.

File No. GA-2009-0264

Decided: April 29, 2009

Gas §3. The Commission granted Missouri Gas Utility a certificate of convenience and necessity to provide natural gas service in portions of Pettis and Benton counties.

**ORDER GRANTING CERTIFICATE
OF PUBLIC CONVENIENCE AND NECESSITY**

Syllabus:

This order grants Missouri Gas Utility, Inc., a certificate of convenience and necessity to provide natural gas sales and transportation service in the cities of Green Ridge, Cole Camp, Lincoln and Warsaw, Missouri ("area certificate") and various other unincorporated areas located in Pettis and Benton County, and a transmission line certificate from the tap on the Southern Star Central Pipeline running approximately 2.5 miles to its requested general service area ("line certificate").

Procedural History:

On January 14, 2009, MGU applied for a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain a natural gas distribution system in the cities of Green Ridge, Cole Camp, Lincoln and Warsaw, Missouri, and various other unincorporated areas located in Pettis and Benton County, and a transmission line certificate from the tap on the Southern Star Central Pipeline running approximately 2.5 miles to its requested general service area.

The Commission issued an order directing notice of the application. In that order, the Commission directed interested parties to ask to intervene no later than February 9, 2009. The Commission received no intervention requests.

On March 31, 2009, the Staff of the Commission filed its verified recommendation. Staff stated that granting the application would be in

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the public interest so long as six conditions were attached to the certificates.

MGU filed an objection to Staff's proposed condition that it "submit to a rate review for this certificated area 24 months after the effective date of the order in this case." MGU also indicated that its plans for construction for the northernmost twenty-five miles of the mainline had changed in that it now intended to use 6" steel instead of 8" HDPE as stated in its Application. In addition, depending on its load estimates, MGU may consider extending the 6" steel an additional 16 miles into Warsaw.

Staff filed a reply to MGU stating that Staff agrees to modify its condition to submission of a rate case in 36 months rather than 24 months. Staff also stated that the change to 6" steel pipe was acceptable.

Findings of Fact:

The Commission has reviewed the verified application and pleadings and finds as follows:

1. MGU is a Colorado corporation in good standing, and has a certificate from the Missouri Secretary of State authorizing it to do business in Missouri. MGU is a "gas corporation" and provides natural gas service in the Missouri counties of Harrison, Daviess and Caldwell.¹

2. MGU's new proposed service area includes Green Ridge, Cole Camp, Lincoln, and Warsaw. Each of these cities is a 4th Class city located in Pettis or Benton County, Missouri.²

3. Green Ridge is located in parts of Sections 1, 2, 11, and 12 in Township 44 N, Range 23 W, and Sections 6 and 7 of Township 44 N, Range 22, all in Pettis County.³

4. Cole Camp is located in parts of Sections 5, 26, 27, 34, 35 and 36 in Township 43 N, Range 21 W, all in Benton County.⁴

5. Lincoln is located in parts of Sections 22, 23, 26, 27, 26, 34 and 35 in Township 42 N, Range 22 W, all in Benton County.⁵

6. Warsaw is located in parts of Sections 8, 9, 15, 16, 17, 20 and 21 in Township 40 N, Range 22 W, all in Benton County.⁶

7. The proposed service area is an area where MGU

¹ *Application*, (filed January 14, 2009) para. 2.

² *Application*, para. 5.

³ *Application*, para. 5.

⁴ *Application*, para. 5.

⁵ *Application*, para. 5.

⁶ *Application*, para. 5.

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currently does not hold a certificate for natural gas service from the Commission.⁷ The legal descriptions of the service areas are set out in Paragraph 9 of the Application and in the map attached as Appendix A to the Application.⁸

8. MGU also requests a line certificate which will utilize a 6" steel line⁹ to serve these communities. This line will begin at a tap on the Southern Star Central Pipeline transmission line in Section 35, Township 46 North, Range 23 West. The first segment of the line will then proceed south within the right-of-way of Thomas Road for a distance of 1.3 miles, then east within the right-of-way of Highway Y for a distance of 0.95 miles, then south within the right-of-way of Highway 127 for one mile. This first segment will have no taps or customers served, and for this first segment MGU is requesting a line certificate only.¹⁰

9. MGU attached a feasibility study to its Application as Appendix B. The feasibility study contains a description of the plans and specifications for the project, including the estimated cost of construction and an estimate of the number of customers, revenues, and expenses during the first three years of operations.¹¹

10. MGU will use the general terms and conditions of service found in its currently approved tariffs, as supplemented by the following rates:¹²

<u>Rate Description</u>	<u>Rate</u>
GS Class Customer Charge	\$15.00/month
GS Class Commodity Charge	\$0.550/CCF
CS Class Customer Charge	\$30.00/month
CS Class Commodity Charge	\$0.600/CCF
LVS Class Customer Charge	\$100.00/month
LVS Class Commodity Charge	\$0.600/CCF
TS Class Customer Charge	\$200.00/month
TS Class Commodity Charge	\$0.600/CCF

11. MGU has sought permission from the Commission to finance this construction in Commission File No. GF-2009-0331.

12. Construction of the project will follow MGU's

⁷ *Application*, para. 5.

⁸ The Commission notes that the text of Paragraph 9 lists Section 13 and 14 in Township 43 North, Range 23 West in both Pettis and Benton Counties; however, according to Appendix A, these Sections are located only in Benton County.

⁹ MGU's Response to Staff Recommendation, (filed April 4, 2009) para. 6.

¹⁰ *Application*, para. 6.

¹¹ *Application*, para. 11.

¹² *Application*, paras. 11 and 13.

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customary standards and the rules of the Commission.¹³

13. The transmission line will not cross any other natural gas lines or railroad tracks, however, the line will cross residential electric and telephone lines, for which MGU will locate through the Missouri One-Call program at the time of construction.¹⁴

14. MGU has obtained franchises from the Cities of Green Ridge, Cole Camp, Lincoln, and Warsaw which were filed with the Application.¹⁵

15. Other than state highway and county road authorities rights-of-way, no other franchise or permit from municipalities, counties, or other authorities in connection with the proposed construction is required to serve this area.¹⁶

16. With the exception of Section 35, the location of the Southern Star Central Pipeline tap, no Commission-regulated gas company supplies natural gas to the proposed area. The Empire District Gas Company may serve some farm taps in Section 35, but MGU seeks only a line certificate in that Section and does not seek to serve any customers in Section 35.¹⁷

17. MGU has the ability to provide service in the proposed area by the construction of new facilities.¹⁸

18. Staff has proposed the following conditions to the certificate:

- a. MGU's shareholders are totally responsible for the success of this project, with no liability or responsibility put on customers;
- b. MGU must keep separate books and records for the proposed service area;
- c. MGU must file separate class cost-of-service studies and revenue requirements for this new service area in its next rate case;
- d. MGU must use the depreciation rates contained in Appendix B to the Staff Recommendation for

¹³ *Application*, para. 13.

¹⁴ *Application*, para. 6.

¹⁵ *Application*, Appendix D.

¹⁶ *Application*, para. 16 and Appendix D.

¹⁷ *Application*, para. 17. The Empire District Gas Company was specifically notified of the Application. See, *Order Directing Notice and Setting Date for Intervention Requests*, issued January 21, 2009.

¹⁸ *Application*, para. 17; *Staff Recommendation*, (filed March 31, 2009) Appendix A, p. 2-3; *Reply to MGU's response to Staff Recommendation*, (filed April 6, 2009) .

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- e. the service territory requested in this application; MGU will submit to a rate review for this certified area 36 months after the effective date of the order in this case; and
- f. MGU can obtain the capacity on the pipeline to fully serve this area for all of its customer classes, including capacity to serve any future growth.

19. The requested certificate of convenience and necessity would not jeopardize MGU's current natural gas service if Staff's conditions are met.¹⁹

20. The proposed service with Staff's conditions will provide an option for customers in the area and is in the public interest.

Conclusions of Law:

1. MGU is a "gas corporation" and a "public utility" as defined in subsections 386.020(18) and (42), RSMo Cum. Supp. 2008.

2. MGU is subject to the Commission's jurisdiction under Chapters 386 and 393, RSMo 2000.

3. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.²⁰ A gas corporation may not exercise any right under a franchise unless the Commission gives it a certificate.²¹ Also, the Commission may impose such conditions on the certificate as it deems reasonable and necessary.²²

4. The permission and approval that may be granted pursuant to section 393.170 is of two types: The PSC may grant CCNs for the construction of power plants, as described in subsection 1, or for the exercise of rights and privileges under a franchise, as described in subsection 2. *See Harline*, 343 S.W.2d at 185 (quoted in *Aquila I*, 180 S.W.3d at 33). Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two subsections of section 393.170. Permission to build transmission lines

¹⁹ *Staff Recommendation*, Appendix A, p. 2.

²⁰ Section 393.170.1, RSMo. 2000.

²¹ Section 393.170.2, RSMo. 2000.

²² Subsection 393.170.3, RSMo 2000.

or production facilities is generally granted in the form of a "line certificate." See 4 CSR 240-3.105(1)(B). A line certificate thus functions as PSC approval for the construction described in subsection 1 of section 393.170.^{FN6} Permission to exercise a franchise by serving customers is generally granted in the form of an "area certificate." See 4 CSR 240-3.105(1)(A). Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170.²³

4. The Commission concludes that the conditions recommended by Staff are reasonable and necessary.

5. Based on its findings of fact above, the Commission concludes that with the conditions proposed by Staff, the proposed service area is both necessary and convenient for the public service.

6. The Commission authorizes MGU to construct, install, own, operate, control, manage, and maintain a natural gas distribution system as described in its application and supplemented by its April 9, 2009 response.

7. The Commission also concludes that it is reasonable and necessary for MGU to file revised tariff sheets that reflect this new certificated area and the rates for that area.

THE COMMISSION ORDERS THAT:

1. Subject to the conditions set out below, Missouri Gas Utility, Inc., is granted a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain a natural gas distribution system to provide natural gas sales and transportation service in Green Ridge, Cole Camp, Lincoln, and Warsaw in Pettis and Benton Counties specifically as set out in the map filed as Appendix A to the Application on January 14, 2009. Appendix A is attached to this order.

2. Subject to the conditions set out below, Missouri Gas Utility, Inc., is granted a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain a natural gas transmission line to provide natural gas sales and transportation service to the communities set out above. The line certificate shall begin at a tap on the Southern Star Central Pipeline transmission line in Section 35, Township 46 North, Range 23 West, then proceed south

²³ *State ex rel. Cass County v. Public Service Com'n*, 259 S.W.3d 544, 549 (Mo.App. 2008) (footnote omitted).

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within the right-of-way of Thomas Road for a distance of 1.3 miles, then east within the right-of-way of Highway Y for a distance of 0.95 miles, then south within the right-of-way of Highway 127 for one mile as shown on the map marked as Appendix A attached to this order.

3. The certificates are granted with the following conditions:

- a. MGU's shareholders shall be responsible for the success of this project, with no liability or responsibility on the ratepayers;
- b. MGU must keep separate books and records for the proposed service area;
- c. MGU must file separate class cost-of-service studies and revenue requirements for this new service area in its next rate case;
- d. MGU must use the depreciation rates contained in Appendix B to the Staff Recommendation for the service territory requested in this application;
- e. MGU will submit to a rate review for this certified area 36 months after the effective date of the order in this case; and
- f. MGU must be able to obtain the capacity on the pipeline to fully serve this area for all of its customer classes, including capacity to serve any future growth.

4. The certificates of convenience and necessity referenced in ordered paragraphs 1 and 2 shall become effective on May 9, 2009.

5. Missouri Gas Utility, Inc., shall file with the Commission tariff sheets describing the new area and line certificates and the rates set out in this order no later than June 8, 2009. The tariffs shall specifically describe the Sections for which Missouri Gas Utility, Inc., has a line certificate and for which it has an area certificate.

6. Missouri Gas Utility, Inc., shall not serve the new service area granted in this order before the tariff sheets described in paragraph 5 become effective.

7. Nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures involved, nor of the value for ratemaking purposes of the properties involved, nor as an acquiescence in the value placed on the property.

8. The Commission reserves the right to consider the

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ratemaking treatment to be afforded the properties involved, and the resulting cost of capital, in any later proceeding.

9. This order shall become effective on May 9, 2009.

Clayton, Chm., Murray, Davis,
Jarrett, and Gunn, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

In the Matter of the Verified Petition of Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. for Arbitration of Interconnection Agreements with Southwestern Bell Telephone Company, d/b/a AT&T Missouri*

Case No. CO-2009-0239

Decided May 6, 2009

Evidence, Practice and Procedure §28 The Commission has jurisdiction to arbitrate any open issues that are the subject of the parties' Sections 251 and 252 negotiations.

Telecommunications §46.1 The Commission has jurisdiction to arbitrate any open issues that are the subject of the parties' Sections 251 and 252 negotiations.

**ORDER DENYING APPLICATION FOR RECONSIDERATION
AND ADOPTING FINAL ARBITRATOR'S REPORT**

This order denies Southwestern Bell Telephone Company, d/b/a AT&T Missouri's motion for reconsideration of the Commission's February 19, 2009 Order Denying Motion to Dismiss. The order also adopts in whole the Final Arbitrator's Report issued on April 13, 2009.

Case History:

On December 5, 2008, Sprint Communications Company, L.P., Sprint Spectrum L.P., and Nextel West Corp. (collectively referred to as "Sprint") filed a Petition for Arbitration under Section 252(b) of the federal Communications Act of 1934, as amended,¹ seeking arbitration of an interconnection agreement between Sprint and AT&T. Sprint had previously filed a complaint² against AT&T seeking to port to Missouri a

¹ 47 U.S.C. § 252(b)(1).

² Case No. TC-2008-0182.

*This case was appealed to the Missouri Court of Appeals (ED) and affirmed. See WL 147897 (E.D. Mo 2011). This case was not reported in F. Supp. 2d.

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Kentucky interconnection agreement pursuant to the conditions imposed by the Federal Communications Commission on the merger between AT&T and BellSouth. The Commission dismissed that complaint stating that the Commission did not have jurisdiction to interpret and enforce a Kentucky-approved interconnection agreement.¹ The Commission also stated that Sprint had not requested that the Commission arbitrate any open interconnection issues, approve or reject an interconnection agreement, or enforce an existing interconnection agreement as the Commission is authorized to do under the federal law.² Failing in its attempt to port the Kentucky agreement to Missouri, Sprint now seeks an extension by a period of three years of its current Missouri-approved interconnection agreements with AT&T.

On December 30, 2008, AT&T filed a motion to dismiss the petition for lack of jurisdiction. After a response from Sprint and a further reply from AT&T, the Commission denied AT&T's motion to dismiss. The arbitration hearing took place on February 25, 2009, as scheduled. AT&T filed an application for reconsideration or rehearing on February 27, 2009. Sprint filed a response to that motion and AT&T filed a further reply. The Arbitrator issued her Draft Arbitrator's Report on March 27, 2009, and on April 13, 2009 issued the Final Arbitrator's Report. The Commission held oral arguments regarding the motion and the Final Arbitrator's Report on April 28, 2009.

Application for Reconsideration and/or Rehearing:

Sprint filed its petition for arbitration and presented as the only issue for arbitration, whether it should be allowed to extend its current Missouri interconnection agreements for a period of three years. AT&T argues that the Section 252 negotiations that were taking place had nothing to do with the Missouri interconnection agreements. AT&T's theory is that the Commission does not have jurisdiction to enforce the FCC's Merger Order,³ it only has authority to arbitrate open issues related to interconnection agreements and this was not an open issue that was voluntarily negotiated.

Sprint argues that as a matter of law (the Merger Order), AT&T was required to offer extension of the current interconnection agreements for a period of up to three years. In addition, Sprint argues, as the Arbitrator found, that negotiations regarding the Missouri

¹ *Order Granting Motion to Dismiss* (effective July 4, 2008), Case No. TC-2008-0182.

² *Id.*

³ The Commission previously ruled in this manner in the earlier, related complaint case. See. *Order Granting Motion to Dismiss*, Case No. TC-2008-0182 (issued June 24, 2008).

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interconnection agreements took place during the Section 252 negotiation window and therefore became an open issue for arbitration. Sprint further argues that the Commission must interpret and apply the merger conditions in order to resolve the issue in this arbitration.

The Commission has jurisdiction “to arbitrate any open issues” that are the subject of the parties’ Sections 251 and 252 negotiations.⁴ Sprint has asked that the Commission arbitrate the single issue of extending the term of the current interconnection agreements.

AT&T is correct in its assertion that merely calling something an open issue or an interconnection-related issue does not make it so. In this instance, however, AT&T and Sprint had multiple exchanges regarding the Missouri interconnection agreements even though the bulk of their negotiations were about the Kentucky agreements. The Commission continues to find that it has authority to interpret and enforce interconnection agreements and to determine through arbitration the appropriate lawful and non-discriminatory terms of that agreement.⁵ In particular the Commission finds that it has jurisdiction to arbitrate this matter and denies AT&T’s application for reconsideration.

Adoption of the Final Arbitrator’s Report:

Commission Rule 4 CSR 240-36.040(24) allows the Commission to adopt, modify, or reject the arbitrator’s final report, in whole or in part. The Commission has considered the Final Arbitrator’s Report, the comments filed by the parties, and the oral arguments held on April 28, 2009. The Commission adopts in whole the Arbitrator’s Final Report issued on April 13, 2009.

THE COMMISSION ORDERS THAT:

1. The application for reconsideration and/or rehearing filed by Southwestern Bell Telephone Company, d/b/a AT&T Missouri, on February 27, 2009, is denied.
2. The Final Arbitrator’s Report issued on April 13, 2009, is adopted in whole.
3. The parties shall file an interconnection agreement that conforms to this order no later than May 13, 2009.

⁴ 47 U.S.C.A. § 252(b)(1).

⁵ 47 U.S.C.A. §§ 251 and 252.

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4. This order shall become effective on May 12, 2009.

Clayton, Chm., Davis, Jarrett,
and Gunn, CC., concur.
Murray, C., dissents, with separate
dissenting opinion attached.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Final Arbitrator's Report in this case has not been published. If needed, the document is available in the official case files of the Public Service Commission.

**In the Matter of the Application of Nancy and Ron Gilkey, Jr. for a
Change of Electrical Supplier**

*File No. EO-2009-0315
Decided May 11, 2009*

Electric §4.1. Section 91.025.2, RSMo 2000, gives the Commission authority to order a change of suppliers for property served by a municipally owned or operated electric power system on the basis that the change is in the public interest for a reason other than a rate differential. Safety concerns, Rich Hill's efforts to address those concerns, Rich Hill's and Osage Valley's support of the request, and Osage Valley's energy audit program are all factors supporting a Commission finding that the change in suppliers would be in the public interest for a reason other than a rate differential.

ORDER APPROVING CHANGE OF ELECTRIC SERVICE SUPPLIER

On March 5, 2009,¹ Nancy and Ron Gilkey, Jr. (hereafter "the Gilkeys") asked the Commission to allow them to change their electrical supplier from the City of Rich Hill, Missouri (hereafter "Rich Hill") to Osage Valley Electric Cooperative (hereafter "Osage Valley"). On March 25, the Staff of the Commission (hereafter "Staff") filed Staff's Motion to Add Parties. The Commission granted that motion on April 15, adding Rich Hill and Osage Valley as parties.

¹ All calendar references are to 2009 unless otherwise stated.

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On April 29, Staff filed its recommendation. Staff indicated the request for a change in supplier was in the public interest for a reason other than a rate differential, and recommended the Commission approve the request for the Gilkeys' two structures. Staff explained that the Gilkeys' safety concerns, Rich Hill's efforts to address those concerns, Rich Hill's and Osage Valley's support of the Gilkeys' request, and Osage Valley's energy audit program are all factors supporting a Commission finding that the change in suppliers would be in the public interest for a reason other than a rate differential.

Section 91.025.2, RSMo 2000, gives the Commission authority to order a change of suppliers for property served by a municipally owned or operated electric power system on the basis that the change is in the public interest for a reason other than a rate differential. The Commission has reviewed the application and Staff's verified recommendation, which are hereby admitted into evidence. For the reasons elucidated by Staff, the Commission finds that the change of supplier is in the public interest for a reason other than a rate differential. Therefore, the Commission will grant the application.

THE COMMISSION ORDERS THAT:

1. Nancy and Ron Gilkey, Jr.'s application for a change of electric supplier for their two structures from the City of Rich Hill, Missouri to Osage Valley Electric Cooperative is granted.
2. This order shall become effective on May 21, 2009.
3. This case shall be closed on May 22, 2009.

Ronald D. Pridgin, Senior Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

**In the Matter of the Missouri-American Water Company Contract
with Premium Pork, L.L.C. (now known as Triumph Foods, L.L.C.),
for the Retail Sale and Delivery of Potable Water**

*File No. WO-2009-0303
Decided May 21, 2009*

Water §1. The Missouri Public Service Commission denies the Office of the Public Counsel's request for the Commission to review a Contract for Retail Sale and Delivery of

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Potable Water between Missouri-American Water Company and Premium Pork, L.L.C. authorized in File No. WT-2004-0192.

Water §6. The Office of the Public Counsel voluntarily submitted to the Commission's jurisdiction by exercising its discretionary authority to participate in this action. Section 386.710.1; Commission Rule 4 CSR 240-2.010(11).

Water §6. MAWC is a "water corporation," a "sewer corporation" and a "public utility" as those terms are defined in Sections 386.020(59), 386.020(49) and 386.020(43) RSMo Cum. Supp. 2008, respectively, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

Water §16. The Commission authorized MAWC to perform according to an agreement negotiated between MAWC and Premium Pork, L.L.C. (Premium Pork is currently known as Triumph Foods, L.L.C.) for the retail sale and delivery of water.

Water §16. Commission review of the continued appropriateness of the alternative rate set forth in the contract after the initial five years of the contract is authorized by MAWC's Economic Development Rider tariff ("EDR").

Water §16. The result of any contract review conducted under the EDR may only be implemented in a general rate proceeding.

Evidence, Practice and Procedure §25. Public Counsel's request is premature in that it fails to establish that Triumph has received the five-year benefit contemplated by the contract or that a general rate case is pending in which any action could be taken on the contract.

Evidence, Practice and Procedure §26. A party must provide a sufficient factual basis and legal theory to support the grant of the motion.

Evidence, Practice and Procedure §26. Public Counsel failed to establish a sufficient factual basis and legal theory to support the grant of its motion.

ORDER DENYING PUBLIC COUNSEL'S REQUEST FOR A REVIEW OF A CONTRACT FOR RETAIL SALE OF WATER

On February 20, 2009, the Office of the Public Counsel ("Public Counsel") filed a request for the Commission to "review" a Contract for Retail Sale and Delivery of Potable Water between Missouri-American Water Company and Premium Pork, L.L.C. allegedly authorized in File No. WT-2004-0192. The Commission set a deadline for responses and Missouri-American Water Company ("MAWC"), Triumph Foods, L.L.C. ("Triumph") and the Commission's Staff all replied.

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Background

On October 17, 2003, Missouri-American Water Company ("MAWC") filed an application with the Commission seeking authorization to perform according to an agreement negotiated between MAWC and Premium Pork, L.L.C. (Premium Pork is currently known as Triumph Foods, L.L.C.) for the retail sale and delivery of water. The application was designated as Commission File No. WT-2004-0192. A highly confidential Contract for Retail Sale and Delivery of Potable Water ("Contract") between MAWC and Premium was filed and the Commission authorized MAWC to perform according to the Contract. Since the Contract is for a period of ten or more years, MAWC's Economic Development Rider tariff, on file with the Commission, requires:

"...that: (1) the Commission's Staff and the Office of Public Counsel have the right to request a Commission review of the continued appropriateness of the alternative rate set forth in the contract after the initial five years of the contract, with the purpose of such review being to determine whether the alternative rate continues to be in the best interest of all customers in the Company's service territory; (2) the Commission, acting on its own volition, may also open an inquiry in this regard; (3) if, upon such review(s), the Commission finds that the contract, as implemented, no longer serves the public interest, it may allow the Company to continue providing service under the contract after adjusting rate conditions to restore the interests of the Company's other customers in the service territory, or it may direct the Company to terminate the contract; and (4) the results of any review(s) conducted under these provisions shall be implemented in a general rate proceeding."¹

Public Counsel's Request

Five years have now passed since the Commission authorized MAWC to perform under the Contract, and Public Counsel requests a review of the Contract to determine the continued appropriateness of the alternative rate set forth in the Contract. Public Counsel states that a review is appropriate because the variable cost identified in the original application has increased significantly, resulting in diminished benefit to other ratepayers.

¹ MAWC's P.S.C. MO. No. 1, Revised Tariff Sheet No. 49 & 54 for the City of St. Joseph, MO and Vicinity.

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Staff's Response

Staff supports the review.

MAWC's Response

MAWC states that if the Commission determines that a review of the Contract is appropriate, it will not object and will participate in the review.

Triumph Foods' (formerly Premium Pork) Response

Triumph described the relevant background to the Commission's approval of the Contract as follows:

- a) The St. Joseph Stockyards was only one site the Company considered for its pork-processing facility and the most important factor in the selection of its plant location decision was the level of utility rates. The Company, in Case No. WT-2004-0192, made clear that would not locate in St. Joseph without the contracted water rates.
- b) In WT-2004-0192, the Commission found that the Company was eligible for a discounted rate under the Economic Development Rider Tariff because the Company was a new industrial customer from outside Missouri, its annual customer load factor equaled or exceeded 55%, the projected Average Annual Billing Demand was at least 0.5% of the total consumption of the St. Joseph District of MAWC, and the new facility would create at least 50 new permanent jobs in the district. The Commission noted that the general incentives were not sufficient because Triumph had a viable competitive alternative in another area and the availability of a competitive water rate was critical to the Company's decision to locate in St. Joseph. Finally, the Commission found that the Contract provided for a reasonable contribution to "all other costs associated with the provision of service" and that this contribution provided a benefit to other customers because it served to reduce the revenue requirement of the St. Joseph district as a whole.
- c) The new facility was forecasted to cost Triumph approximately \$130 million, and was estimated to lead to the creation of 1,000 jobs, including 800 processing jobs and 200 jobs in the associated corporate headquarters. Each of these persons was projected to earn over \$10.00 per hour in pay and benefits, making an annual impact on the St. Joseph economy of at least \$21 million. Further, it was estimated that over 300 persons would be employed in the construction of the plant, earning over

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\$7 million in wages; that the facility would pay about \$1.2 million annually in local taxes; and that another 218 jobs, with an annual payroll of about \$25 million, will be created by 2005. By 2017, the Company projected that it will be paying annual salaries and wages of over \$66 million.

- d) Triumph Foods now employs 2,700 people with 2,300 of those in production-related positions and 400 holding management and clerical positions. Total payroll for 2008 was \$83.6 million, with an hourly average wage of \$14.00. The Company has far exceeded its estimates of jobs created and annual payroll noted in its original application to the Commission, filed on November 25, 2003. Although it estimated that payroll would not exceed \$66 million until 2017, it surpassed that level in 2008. In addition to the impact of jobs and payroll, Triumph Foods maintains its corporate headquarters in St. Joseph, and purchases goods and services locally and pays local taxes and donates to local community organizations. The Company estimates its annual positive revenue impact to the St. Joseph community for 2008 was over \$125 million.

Triumph objects to the review for multiple reasons:

- a) Because any change to the Contract must be implemented in a general rate case, and since no such case is pending, Triumph believes that any contract review is premature.
- b) The Contract allowed MAWC to provide Triumph with water service at a competitive rate for a period in excess of ten years.
- c) While the Commission authorized MAWC to perform according to the Contract on November 25, 2003, the Company began its operations on January 2, 2006. **Therefore, it has not purchased water under the rates provided for in the Contract for the five years noted in the Commission's order.** Thus, the Company suggests that any review of the Contract should be delayed until the Company has purchased water under the Contract for five years.
- d) In the current economic climate, where the severe recession affecting the United States and Missouri has led to new levels of high unemployment and an unprecedented crisis in the financial markets, the Commission should allow the Company to receive the full benefits of the Contract for at least a full five years of its operations before initiating any review of the agreement.
- e) Any cancellation or modification of the terms of the Contract

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would cause the Company to seriously consider alternatives to its current supply of water from Missouri-American. These alternatives would include a comprehensive investigation of providing its water needs through a well system or other form of self-supply.

Decision

The Commission finds that Triumph has not yet received the five-year benefit contemplated by the contract and that Public Counsel's request is premature. Moreover, the earliest the Commission could take any action with regard to this contract would be when MAWC's files its next general rate increase request. The Commission shall deny Public Counsel's request. Public Counsel is free to renew its request at an appropriate time.

IT IS ORDERED THAT:

1. The "Office of the Public Counsel's Request for Review" is denied.
2. This order shall become effective immediately upon issue.

Harold Stearley, Senior Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

In the Matter of the Application of The Empire District Electric Company for an Accounting Order Concerning Reclassification of Certain Transmission and Distribution Facilities

*File No. EO-2009-0233
Decided June 3, 2009*

Accounting §4. The Federal Energy Regulatory Commission has given deference to state commissions to make the distinction between electric distribution and transmission facilities.

Accounting §19. The Commission authorized The Empire District Electric Company to use the Southwest Power Pool's criteria and definition to classify transmission and distribution assets placed in service after January 1, 2008; resulting in no changes to the company's current classification of investment in those facilities.

**ORDER GRANTING APPLICATION
CONCERNING RECLASSIFICATION OF CERTAIN TRANSMISSION
AND DISTRIBUTION FACILITIES**

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Background

The Southwest Power Pool (SPP) exercises functional control over all of The Empire District Electric Company's transmission assets. Such control is exercised through the SPP's Open Access Transmission Tariff. The SPP sought to modify the definition of "transmission facilities" in its Tariff and, on September 30, 2005, obtained approval from the Federal Energy Regulatory Commission to do so. The FERC, however, has given deference to state commission to make the distinction between distribution and transmission facilities.

Under the revised tariff, Empire was required to file with this Commission by October 1, 2008, a request for a determination of which facilities would be defined as transmission facilities. After obtaining FERC approval for an extension of time to do so, Empire filed its application with this Commission on December 1, 2008.

The Application

For its relief, the company requests that the Commission: (1) grant Empire accounting authority to make no changes to the current classification of investment in transmission and distribution facilities recorded on Empire's books and records prior to January 1, 2008; (2) accept as reasonable, Empire's methodology used to determine which of its transmission and distribution assets are Transmission Facilities and the resulting determinations by Empire regarding transmission and distribution assets placed in service prior to January 1, 2008; and (3) authorize Empire to utilize the Southwest Power Pool's criteria and definition to classify transmission and distribution assets placed in service after January 1, 2008. Empire explains that the cost of reclassifying assets placed into service prior to January 2008, would outweigh the benefits.

Staff Recommendation

The Staff of the Commission recommends that the Commission grant the relief Empire requests. Staff informs the Commission that reclassification of transmission and distribution plant installed prior to 2008 under the SPP classification criteria would tend to slightly reduce Empire's level of transmission revenue recovery from the SPP. Staff explains that, all else being equal, a reduction in SPP transmission revenues would result in an immaterial increase in Empire's Missouri jurisdictional revenue requirement.

Conclusion

Having reviewed the application and Staff recommendation, the Commission finds the Commission will grant the requested relief.

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Additionally, the Commission accepts as reasonable the methodology used, and the resulting determination made, by Empire to determine which of its transmission and distribution assets are transmission facilities. Finally, consistent with Staff's memorandum, the Commission will not be bound to ratemaking treatment afforded to Empire's cost of service components.

THE COMMISSION ORDERS THAT:

1. The Empire District Company's application for an accounting order concerning reclassification of certain transmission and distribution facilities is granted.
2. The Empire District Electric Company is granted accounting authority to make no changes to the current classification of investment in transmission and distribution facilities recorded on Empire's book and records prior to January 1, 2008
3. The Empire District Electric Company is authorized to use the Southwest Power Pool criteria and definition to classify transmission and distribution assets placed in service after January 1, 2008.
4. Approval of this application in no way binds the Commission regarding ratemaking treatment of Empire's cost of service components.
5. This order shall become effective on June 13, 2009.
6. This case shall be closed on June 14, 2009.

Clayton, Chm., Davis, Jarrett,
and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

In the Matter of Mid MO Sanitation, LLC's Application for a Certificate of Convenience and Necessity Authorizing It to Own, Operate, Maintain, Control, and Manage, a Sewer System in Callaway County, Missouri.

File No. SA-2009-0319
Decided June 3, 2009

Sewer §2. Based on a stipulation and agreement filed by the parties, the Commission found that Mid MO Sanitation's request for authority to own and operate a sewer system is necessary or convenient for the public service.

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ORDER APPROVING STIPULATION AND AGREEMENT

On March 6, 2009, Mid MO Sanitation LLC filed an application seeking a certificate of convenience and necessity to own, operate, maintain, control, and manage a sewer system in Callaway County, Missouri. On May 21, 2009, Mid MO, Staff, and the Office of the Public Counsel filed a unanimous stipulation and agreement regarding Mid MO's application.

The Commission's review of the stipulation and agreement shows that the parties have stipulated to certain facts and waived their right to a hearing. Because the parties have agreed to these facts, the Commission accepts them as true and adopts them as stipulated.¹ The stipulation and agreement indicates all parties agree that Mid MO's application for a certificate of convenience and necessity is in the public interest and advise the Commission to approve that application. Furthermore, the parties agree that Mid MO's annual revenue requirement should be established at \$22,500. The agreed-upon revenue requirement will result in a flat customer charge of \$64.66 per month for residential customers and \$96.98 per month for commercial customers. Mid MO agrees to file a tariff reflecting the agreed-upon annual revenue requirement and customer charges by June 1, to be effective July 1. The parties also agree that the annual revenue requirement and the agreed-upon rates are to be interim and subject to a customer refund depending upon the results of a small utility rate case. Finally, the parties agree that Mid-MO is to commence a small utility rate case proceeding within 90 days of the Commission's approval of the stipulation and agreement.

After reviewing the unanimous stipulation and agreement and the undisputed facts described in Staff's recommendation, the Commission finds the stipulation and agreement to be reasonable. The Commission will approve the stipulation and agreement. Based on that stipulation and agreement, the Commission concludes that Mid MO's request for authority to own and operate a sewer system is necessary or convenient for the public service.

THE COMMISSION ORDERS THAT:

1. The unanimous stipulation and agreement filed on May 21, 2009, is approved. A copy of the stipulation and agreement is

¹ *Buckner v. Buckner*, 912 S.W.2d 65,70 (Mo. App. W.D. 1995)

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attached to this order.

2. The signatory parties are ordered to comply with the terms of the stipulation and agreement.

3. Mid MO Sanitation, LLC's annual revenue requirement is established as \$22,500, subject to a customer refund or credit based on the results of a small utility rate case.

4. Mid MO Sanitation, LLC, shall implement a flat customer charge of \$64.66 per month for residential customers and \$96.98 per month for commercial customers.

5. Mid MO Sanitation, LLC, shall file a proposed tariff, with a 30-day effective date, reflecting the ordered annual revenue requirement and customer charges.

6. Mid MO Sanitation, LLC, shall file a small utility rate case pursuant to Commission Rule 4 CSR 240-3.050 within 90 days of the effective date of this order.

7. This order shall become effective on June 13, 2009.

Clayton, Chm., Davis, Jarrett,
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: Another order in this case can be found at page 610.

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In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of its Regulatory Plan

Case No. ER-2009-0089

Decided June 10, 2009

Electric §1. The Commission approves a non-unanimous stipulation and agreement and concludes the proposed increase in overall Missouri gross annual electric revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or similar fees or taxes, of \$95 million (\$10 million of which is composed by Additional Amortization to Maintain Financial Ratios), effective for electric services rendered on and after September 1, 2009, is just and reasonable and is fair to both the utility and its customers.

Electric §1. The Commission concludes that an equal percentage, across-the-board, spread of the rate increase, with the exception of the deviations outlined with regard to the Large Power Class and separately-metered space heating and winter energy blocks on the all-electric rates for general service classes is just and reasonable.

Electric §1. The Commission approves a non-unanimous stipulation and agreement regarding pensions and other post employment benefits concluding its terms are just and reasonable.

Electric §7. KCPL is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (43), RSMo Cum. Supp. 2008, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

Electric §9. The Commission has authority to suspend KCPL's submitted tariff pursuant to Section 393.150, RSMo 2000.

Electric §9. The Commission has the statutory mandate to ensure safe and adequate service at just and reasonable rates pursuant to Section 393.130, RSMo 2000.

Electric §9. The Commission is vested with the state's police power to set just and reasonable rates for public utility services, subject to judicial review of the question of reasonableness.

Electric §9. The standard for evaluating proposed rate involves an examination of the "public interest," which is a matter of policy to be determined by the Commission.

Electric §14. Commission Rules 4 CSR 240-2.060, 3.030 and 3.160 outline the minimum filing requirements for rate increase requests.

Electric §20. Parties regularly engage in settlement negotiations and resolve their disputes with "black box" settlements arriving at a final revenue requirement number that they all find acceptable without revealing how the parties arrived at that number.

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Electric §26. Parties regularly engage in settlement negotiations and resolve their disputes with “black box” settlements arriving at a final revenue requirement without agreeing upon a utility’s rate base.

Electric §29. Parties regularly engage in settlement negotiations and resolve their disputes with “black box” settlements arriving at a final revenue requirement without agreeing upon a rate of return.

Evidence, Practice and Procedure §8. Contested cases are proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

Evidence, Practice and Procedure §8. Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without *separately stating* findings of fact and conclusions of law.

Evidence, Practice and Procedure §8. A stipulation and agreement that is entered into by fewer than all parties to a case is deemed to be a non-unanimous stipulation and agreement pursuant to Commission Rule 4 CSR 240-2.115(2)(A).

Evidence, Practice and Procedure §8. A non-unanimous stipulation and agreement may be treated as being unanimous if non-signatories parties fail to object.

Evidence, Practice and Procedure §8. Failure to file a timely objection to a non-unanimous stipulation and agreement constitutes a full waiver of that party’s right to a hearing.

Evidence, Practice and Procedure §26. Pursuant to Section 393.150.2, RSMo 2000, as the party requesting the rate increase, KCPL bears the burden of proving that its proposed rate increase is just and reasonable.

Evidence, Practice and Procedure §26. In order to carry its burden of proof, KCPL must meet the preponderance of the evidence standard and must convince the Commission it is more likely than not that KCPL’s proposed rate increase is just and reasonable.

Evidence, Practice and Procedure §26. While a utility has the burden of proof, there is initially a presumption that its expenditures are prudent.

Evidence, Practice and Procedure §26. It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.

Evidence, Practice and Procedure §26. Determining what is in the interest of the public is a balancing process in which the total interests of the public served must be assessed, meaning that some of the public may suffer adverse consequences for the total public interest.

Evidence, Practice and Procedure §26. Individual rights are subservient to the rights of the public and the “public interest” necessarily must include the interests of both the ratepaying public and the investing public.

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ORDER APPROVING NON-UNANIMOUS STIPULATIONS AND AGREEMENTS AND AUTHORIZING TARIFF FILING

Syllabus

This order approves the Non-Unanimous Stipulation and Agreement executed by Kansas City Power and Light Company ("KCPL" or KCP&L), the Staff of the Missouri Public Service Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), Praxair, Inc. and the Midwest Energy User's Association (collectively "Industrial Intervenors"), the US Department of Energy ("DOE"), the National Nuclear Security Administration ("NNSA"), the Federal Executive Agencies ("FEA"), Ford Motor Company ("Ford"), the Missouri Industrial Energy Consumers ("MIEC") and the Missouri Department of Natural Resources ("DNR") to resolve all issues in this case ("Global Agreement").¹ The order also rejects KCPL's initial tariff filing, and authorizes KCPL to file tariffs in compliance with the Non-Unanimous Stipulation and Agreement.

This order further approves the Non-Unanimous Stipulation and Agreement Regarding Pensions and Other Post Employment Benefits ("OPEBs") executed by KCPL and Staff ("Pension & OPEB Agreement").²

The Global Agreement and Pension & OPEB Agreement may also be referred to throughout this Order singularly or collectively as an "Agreement" or as the "Agreements." The parties signing the agreements may be referred to collectively as "Signatories." The term "Non-Utility Signatory" refers to a party other than KCPL that has signed the Agreements.

I. Procedural History

On September 5, 2008, Kansas City Power & Light Company ("KCPL") submitted to the Commission proposed tariff sheets intended to implement a general rate increase for electrical service provided in its Missouri service area. The proposed tariff sheets bear an effective date of August 5, 2009.

According to KCPL's application, the tariff sheets are designed to

¹ The parties who are non-signatories to the agreement are the City of Kansas City, Missouri, Hospital Intervenors, Trigen-Kansas City Energy Corporation, Missouri Gas Energy, The Empire District Electric Company, Union Electric Company d/b/a AmerenUE, and the Missouri Joint Municipal Electric Utility Commission.

² This agreement purports to resolve pension and OPEB costs for KCP&L as of April 30, 2009.

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produce an annual increase of \$101.5 million in KCPL's Missouri jurisdictional revenues, which would be a 17.5 percent increase in revenue. The press release attached to the application stated that a typical Missouri residential customer would see a 16.2 percent increase in rates or approximately \$12.27 per month increase in charges. Together with its proposed tariff sheets and other minimum filing requirements, KCPL also filed prepared direct testimony in support of its requested rate increase.

On November 20, 2008, the Commission set the procedural schedule. This schedule included an evidentiary hearing scheduled for April 20 – May 1, 2009, and ultimately a True-Up hearing was scheduled for July 1-2, 2009.³

The Commission held local public hearings in Lee's Summit, Sedalia, St. Joseph, Marshall, Carrollton, Nevada, and two separate hearings in Kansas City, Missouri.⁴ At the conclusion of all of the local public hearings, the Commission had received the sworn testimony of sixty-eight witnesses.⁵

³ EFIS Docket Entry Number 59, *Order Setting Procedural Schedules*, issued November 20, 2008; EFIS Docket Entry Number 103, *Status Report and Motion to Extend Period to Demonstrate Compliance with Certain In-Service Criteria of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company*, filed March 2, 2009; EFIS Docket Entry Number 77, *Notice Concerning Start-Up Issues at Iatan Unit 1*, filed February 11, 2009; EFIS Docket Entry Number 161, *Order Modifying Procedural Schedules For True-Up Proceedings and Formally Adopting Test Year And Update Period*, issued March 18, 2009. In this same order, the Commission imposed certain conditions on the True-Up proceedings advocated by Staff. However, on April 15, 2009, the Commission rescinded those conditions following an oral argument held on April 6, 2009 on KCPL's and GMO's motion for reconsideration. See Transcript Vol. 10 (EFIS Docket Entry Number 184); EFIS Docket Entry Number 231, *Order Rescinding Conditions Imposed in the Commission's Order Modifying Procedural Schedules for True-Up Proceedings*, issued April 15, 2009.

⁴ EFIS Docket Entry Number 63, *Order Setting Public Comment Hearings*, issued January 6, 2009; EFIS Docket Entry Number 65, *Motion To Revise Local Hearing Schedule To Allow For Notice To Customers*, filed January 9, 2009; EFIS Docket Entry Number 70, *Order Rescheduling Public Comment Hearings*, issued January 23, 2009; EFIS Docket Entry Number 93, *Notice Regarding Requests for Additional Local Public Hearings*, filed February 25, 2009; EFIS Docket Entry Number 96, *Order Expanding Access To Public Comment Hearings*, issued February 25, 2009.

⁵ See Transcript Vol. 2, Lee's Summit - March 2, 2009 – 22 witnesses (EFIS Docket Entry Number 162); Vol. 3, Sedalia - March 3, 2009 – 5 witnesses (EFIS Docket Entry Number 154); Vol. 4, St. Joseph – March 4, 2009 – 7 witnesses (EFIS Docket Entry Number 155); Vol. 5, Marshall – March 5, 2009 – 2 witnesses (EFIS Docket Entry Number 156); Vol. 6, Carrollton – March 9, 2009 – 1 witness (EFIS Docket Entry Number 171); Vol. 7, Nevada – March 11, 2009 (EFIS Docket Entry Number 163); Vol. 8, Kansas City – March 12, 2009 – 13 witnesses (EFIS Docket Entry Number 177); Vol. 9, Kansas City – March 12, 2009 – 14 witnesses (EFIS Docket Entry Number 179).

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The evidentiary hearing commenced on April 20, 2009. Once preliminary matters were complete, the parties requested a recess to engage in settlement negotiations. The hearing reconvened on April 21, where again the parties requested an additional recess to complete settlement negotiations. Following completion of the negotiations, the Signatories to the Agreement presented an Agreement in Principle to the Commission and announced their intention to memorialize a Non-Unanimous Stipulation and Agreement and file it no later than April 24, 2009. Consequently, the Commission suspended the remainder of the evidentiary hearing to allow for the filing of the Agreement and for responses or objections.⁶

On April 24, 2009, KCPL filed the Agreements. Deadlines were set for responses, suggestions supporting the agreements and replies to the suggestions.⁷ No party objected to either of the Agreements and no party requested that the evidentiary hearing be resumed to try any disputed issue.

On June 8, 2009, the Commission convened a hearing for the formal presentation of the Agreements and to direct questions about the Agreements to the parties' counsel and subject matter experts. The Commission did not order briefs and closed the recording of all evidence at the conclusion of the stipulation hearing on June 8, 2009. The case was deemed submitted for the Commission's decision on that date.⁸

II. The Agreements

A. Global Agreement

The Global Agreement provides that KCPL should be authorized to file revised tariff sheets containing new rate schedules for electric service designed to produce overall Missouri jurisdictional gross annual electric revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, in the amount of \$95.0 million for electric service rendered on and after September 1, 2009.⁹ Ten million dollars of the \$95 million rate increase

⁶ Transcript Volumes 11 and 12.

⁷ EFIS Docket Entry Number 263, *Notice And Order Suspending Evidentiary Hearing, Setting Deadlines For Filings And Setting Deadline For Requesting A Hearing*, issued April 21, 2009; EFIS Docket Entry Number 268, *Notice And Order Resetting Deadlines For Filings, Adding Additional Deadlines and Resetting Deadline For Requesting A Hearing*, issued April 27, 2009.

⁸ Commission Rule 4 CSR 240-2.150(1).

⁹ The in-service criteria are attached to the prefiled direct testimony of Brent Davis as Schedule BCD-2. This agreement was conditioned on the Iatan I Air Quality Control System ("AQCS") facilities meet the Staff's in-service criteria by May 30, 2009.

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shall be comprised of Additional Amortization to Maintain Financial Ratios ("Additional Amortizations"), as that term is defined in the Stipulation and Agreement reached in KCPL's proceeding to approve its Experimental Regulatory Plan in Case No. EO-2005-0329 ("2005 Stipulation").¹⁰

The Global Agreement establishes the rate design as an equal percentage, across-the-board basis for each rate class. Within the Large Power Service ("LPS") class, however, no change will be made to the tail block energy charge and, instead, the entirety of the rate increase shall be spread on an equal percent across the board basis between the first two energy blocks, and all demand and service charges.¹¹ The rates for separately metered space heating and the winter energy rate blocks on the all-electric rates for the general service classes shall be increased by an additional five (5%) percentage points above the equal percentage increase. The date for the determination of the interest rate to be paid on deposits will be changed to the first business day of December of the preceding calendar year rather than the last business day of the preceding calendar year.

The Global Agreement contains additional items that the Commission must address. These items include the following: (1) Future Customer Class Cost of Service Study, (2) Vegetation Management and Infrastructure Inspection, (3) Prudence and In-Service Timing of Iatan I, (4) Allocations of Common Plant for Iatan I and II, (5) Additional Amortizations to Maintain Financial Ratios, (6) AFUDC Rate, Surveillance Reporting, (7) Economic Relief Pilot Program, (8) Wolf Creek Refueling Cost, (9) Surface Transportation Board Litigation, (10) Off-System Sales Margins – Excess Over 25th Percentile for 2007 and 2008, (11) Deferred DSM Advertising Costs, (12) Off-System Sales Tracker, (13) Rate Case Expense, (14) Miscellaneous Costs Not Included in Rates, (15) Demand-Side Management, Supplemental Weatherization and Minor Home Repair Program, (16) Low Income/Weatherization Issues, and (17) Pension Agreements. The Signatories negotiated the various terms of these provisions and no other party has objected or sought a hearing with respect to any of these provisions. There are no

¹⁰ See Case Number EO-2005-0329, *In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company*, Report and Order issued July 28, 2005. See also Case Number EO-2005-0329: EFIS Docket Entry No. 1, Stipulation and Agreement, filed on March 28, 2005 and EFIS Docket Entry No. 198, Order Approving Amendments to Experimental Regulatory Plan, issued on August 23, 2005.

¹¹ See Schedule 1 of the Agreement, exemplar revised tariff sheets.

disputed issues between the parties with regard to these provisions of the Global Agreement.

B. Pension and OPEB Agreement

The Pension and OPEB Agreement contains additional items that the Commission must address. These items include the following: (1) FAS 87, FAS 88 and FAS 158 Pension Cost, (2) Pension Cost Treatment for Joint Partners in Iatan and LaCygne Units/Stations, (3) Pension Cost Treatment for the Supplemental Executive Retirement Plan, (4) Annual OPEB Cost of Termination Fees – Case No. ER-2007-0291, (5) Annual Pension Cost and Regulatory Assets – Case No. ER-2009-0089, (6) FAS 88 Pension Cost Treatment for Financial Reporting and Ratemaking, (7) FAS 158 Pension and OPEB Cost Treatment for Financial Reporting and Ratemaking, and (8) Ratemaking Contributions Made Pursuant to the Pension Protection Act.

These provisions largely reaffirm the provisions built into in the Regulatory Plan from Case No. EO-2005-0329 and from other stipulations from KCPL's subsequent rate cases. The Signatories negotiated the various terms of these provisions and no other party has objected or sought a hearing with respect to any of these provisions. There are no disputed issues between the parties with regard to the provisions of the Pension and OPEB Agreement.

III. Relevant Legal Standards

A. Jurisdiction

KCPL is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (43),¹² respectively, and is subject to the personal jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. KCPL filed its application pursuant to Commission Rules 4 CSR 240-2.060, 3.030 and 3.160. These rules outline the minimum filing requirements for KCPL to pursue its rate increase request.

KCPL's rate increase request falls under the Commission's subject matter jurisdiction pursuant to Section 393.150. Additionally, Section 393.130 mandates that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable.

B. Standards for Approving Stipulations and Agreements

The Commission has the legal authority to accept a Stipulation and Agreement as offered by the parties as a resolution of the issues

¹² Section 386.020, RSMo Cum. Supp. 2008.

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raised in this case.¹³

In reviewing the Agreement, the Commission notes:

19. Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.¹⁴

A stipulation and agreement that is entered into by fewer than all parties to a case is deemed to be a non-unanimous stipulation and agreement.¹⁵ Each party is given seven days from the filing of a non-unanimous stipulation and agreement to file an objection to the non-unanimous stipulation and agreement, and failure to file a timely objection constitutes a full waiver of that party's right to a hearing.¹⁶

No party objected to the Agreements within the deadlines set by the Commission.¹⁷ Consequently, pursuant to the Commission's rules, the Agreement shall be treated as though they are unanimous and the Non-Signatory Parties are deemed to have waived their right to a hearing on any issue in this matter. Should the Commission find that the terms of the Global Agreement are lawful and just and reasonable, the Commission may approve the Global Agreement as a resolution of all factual issues in this matter.

Discussion

¹³Section 536.060 and 4 CSR 240-2.115(1)(B).

¹⁴Section 536.090. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App. 1998).

¹⁵Commission Rule 4 CSR-240-2.115(2)(A).

¹⁶Commission Rule 4 CSR 240-2.115(2)(B). The Commission initially set a response deadline of six days for the Global Agreement because it had admitted Exhibit 57 into the record on April 21, 2009 during the evidentiary hearing. Exhibit 57 is the Agreement in Principle outlining the key elements that would be embodied in the Stipulation and Agreement, and being offered into the record on the April 21 essentially gave the parties nine days notice of the general contents of the Agreement. No party objected to the deadline set for responses, (Transcript pp. 268-269). However, once KCPL filed the Pension and OPEB Agreement, an additional agreement without advance notice of its contents, the Commission extended the response deadline to a full seven days for both agreements to ensure adequate time for responses.

¹⁷"A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it." Commission Rule 4 CSR 240-2.115(2)(D). In the instance of a non-unanimous stipulation and agreement that has been timely objected to, all issues shall remain for determination after hearing." Id.

A. Introduction

This case illustrates one of the most important public policy questions faced by this Commission: What is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers and ensuring that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have an opportunity to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure?¹⁸ As already noted, both of these objectives are statutory duties of this Commission.

The Commission recognizes that the recommended revenue requirement and its components presented in the Agreements is not a trivial amount of money to customers like those who testified at the public hearings. The increased cost of all utilities along with the recent rise in food costs, gasoline prices, and healthcare costs have had an effect on customers' ability to keep current on their bills. That being said, the Commission also recognizes that the Agreements before the Commission resulted from negotiations between parties with diverse interests, as well as the Commission's Staff. Local Public Hearings were held to receive public comment on the proposed rate increase, and Public Counsel was an active party to ensure the rights of the ratepaying public.¹⁹

Subject matter experts, including accountants, economists and engineers, filed extensive testimony outlining their respective analyses and positions prior to the Signatories reaching a consensus as to the reasonableness of the Agreements and all of its elements. The Signatories agree, and the Non-Signatories did not raise objection, to the conclusion that the proposed revenue and rate design set out in the Agreement are just and reasonable.

The Commission further notes that no party has objected to the proposed annual revenue requirement, or to any component of any calculations, allocations, negotiations or compromise resulting in the proposed annual revenue requirement as set forth in the Agreements. No party has objected to the use of any determinants or to any Class Cost of Service allocation factors or any other billing determinants utilized for the purpose of determining rate design in the Agreements.

No party has objected to the miscellaneous provisions, or to any

¹⁸ See generally, Section 386.610, RSMo 2000.

¹⁹ See the Procedural History section of this Order.

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component of any calculations, negotiations or compromise resulting in determining the miscellaneous provisions as set forth in the Global Agreement. Similarly, no party has objected, in any way, to any component of any calculations, negotiations or compromise resulting in determining the provisions of the Pension and OPEB Agreement. And finally, no party requested a hearing on any issue related to the determination of the proposed annual revenue requirement, rate design, or any other provision set forth in either of the Agreements.

B. Revenue Requirement

KCPL has compromised on its requested revenue requirement by entering into the Global Agreement and recommending to the Commission that its authorized revenue requirement in this case represents an increase of \$95 million in revenues associated with its electric service. This proposed revenue requirement is advocated for by Staff, Public Counsel and a wide group of industrial and other commercial consumers.

The Reconciliation filed in this case reveals that the parties initially had differing positions on rate base, revenue, expenses, depreciation, and taxes, as well as the many components and allocations that determine these factors. Indeed, as the Commission has recognized many times, the complexity of the issues and the number of parties often involved in rate cases can be staggering. Parties regularly engage in settlement negotiations, sometimes, as in this case, resolving their disputes with “black box” settlements. That is to say, the many parties arrive at, for example, a final revenue requirement number that they all find acceptable. But that settlement does not reveal how the parties arrived at that number, who moved how many dollars on what issue, etc.

Therefore, the Commission finds that the proposed increase in overall Missouri gross annual electric revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or similar fees or taxes, of \$95 million (\$10 million of which is composed by Additional Amortization to Maintain Financial Ratios), effective for electric services rendered on and after September 1, 2009, is just and reasonable and is fair to both the utility and its customers.²⁰

This revenue requirement is concluded to be no more than is sufficient to keep KCPL’s utility plants in proper repair for effective public

²⁰ KCPL satisfied the Global Agreement’s condition that the Iatan I Air Quality Control System (“AQCS”) facilities meet the Staff’s in-service criteria by May 30, 2009. See Transcript, Volume 13, Stipulation Hearing, Testimony of Michael Taylor.

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service, and insure to KCPL's investors a reasonable return upon funds invested. The Commission shall approve the Global Agreement as to KCPL's annual revenue requirement, in all respects, as encompassed in the Global Agreement.

C. Rate Design

No party opposed the rate design as articulated in the Global Agreement. The Signatories agreed to an equal percentage, across-the-board, spread of the rate increase, with the exception of the deviations outlined with regard to the Large Power Class and separately-metered space heating and winter energy blocks on the all-electric rates for general service classes.

The Commission has previously found that the approach of using equal percentage, across-the-board, rate increases essentially maintains the same rate design as exists and that is presently lawful and approved.²¹ Consequently, the Commission concludes that the equal percentage across-the-board, rate increases to individual customer classes, as contemplated by the Global Agreement, are just and reasonable.

With regard to the proposed adjustments, having examined the respective positions of the parties who presented positions on rate design and recognizing that all of those parties agreed certain adjustments needed to be made to the various rate classes, the Commission concludes that the Signatories' compromise on these adjustments affirmatively demonstrates they are just and reasonable adjustments. Further no party has objected to any determinants or factors utilized for the purpose of determining the rate design in the Global Agreement, again demonstrating to the Commission that this portion of rate design is just and reasonable. The Commission shall approve the Global Agreement as to rate design, in all respects, as encompassed in the Global Agreement.

D. Remaining Provisions of the Global Agreement and the Pension and OPEB Agreement

After reviewing the remainder of the items encompassed in the Global Agreement and the Pension and OPEB Agreement, as outlined

²¹ See Case No. ER-2007-0291, In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan., Report and Order, p. 67. See also In re The Empire District Electric Company, Commission Case No. ER-2001-299, Report and Order, p. 21, issued September 20, 2001.

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above, and the parties' positions on, or lack of position on, those items, the Commission finds the proposed items are reasonable as adjunctive provisions of the Agreements. These remaining items proposed in the Agreements, as previously outlined, are acceptable to all concerned parties as evidenced by these parties being either a Signatories to the Agreements or not having objected to these provisions.

The Commission concludes that none of these adjunct provisions to either Agreement are contrary to any statute or rule, or in any way violative of the public interest. The Commission shall approve all of the miscellaneous provisions encompassed in both Agreements.

E. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.²² The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.²³

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.²⁴ "In all

²² In re City of Kinloch, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); Lederer v. State, Dept. of Social Services, Div. of Aging, 825 S.W.2d 858, 863 (Mo. App. 1992).

²³ State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 75 (Mo. banc 1982); Lederer, 825 S.W.2d at 863.

²⁴ State ex rel. AG Processing, Inc. v. Public Serv. Comm'n, 120 S.W.3d 732, 736 (Mo. banc 2003); Fall Creek Const. Co., Inc. v. Director of Revenue, 109 S.W.3d 165, 172 - 173 (Mo. banc 2003); Shelter Mut. Ins. Co. v. Dir. of Revenue, 107 S.W.3d 919, 920 (Mo. banc 2003); Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue, 94 S.W.3d 388, 390 (Mo. banc 2002); Ovid Bell Press, Inc. v. Dir. of Revenue, 45 S.W.3d 880, 886 (Mo. banc 2001); McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee, 142 S.W.3d 228, 235 (Mo. App. 2004); Cent Hardware Co., Inc. v. Dir. of Revenue, 887 S.W.2d 593, 596 (Mo. banc 1994); State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Lacey v. State Bd. of Registration For The Healing Arts, 131 S.W.3d 831, 843 (Mo. App. 2004). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." Columbia v. Mo. State Bd. of Mediation, 605 S.W.2d 192, 195 (Mo. App. 1980); McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee, 142 S.W.3d 228, 235 (Mo. App. 2004). The mere fact that an

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events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”²⁵

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, consistent with the Commission’s statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

Decision

By submitting the Agreements for consideration by the Commission, the Signatories jointly recommend that the Commission accept the Agreements as a fair compromise of their respective positions on the issues in this matter. Based on the Signatories’ Agreements, the testimony received at the local public hearings, and the testimony, comments and positions presented at the stipulation hearing, the Commission finds that the parties have reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service. Accordingly, the Commission shall authorize KCPL to file tariffs in compliance with the Global Agreement. The parties shall be directed to comply with the terms of the Global Agreement and the Pension and OPEB Agreement.

The Commission shall, as agreed to by the Signatories, admit, without modification or condition, the prefiled testimony (including all exhibits, appendices, schedules, etc. attached thereto) of all Signatories’ witnesses.

THE COMMISSION ORDERS THAT:

1. The Non-Unanimous Stipulation and Agreement filed on

administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision. *Id.*

²⁵ *State ex rel. Gulf Transport Co. v. Public Serv. Comm’n*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Serv. Comm’n*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Serv. Comm’n*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); Sections 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

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April 24, 2009, is hereby approved as the resolution of all factual issues encompassed within that Agreement in case number ER-2009-0089. A copy of the Non-Unanimous Stipulation and Agreement is attached to this order as Appendix A.

2. The Signatories to the Non-Unanimous Stipulation and Agreement are ordered to comply with the terms of the Agreement.

3. The proposed electric service tariff sheets (JE-2009-0192) submitted on September 5, 2008, by Kansas City Power and Light Company for the purpose of increasing rates for electric service to retail customers are hereby rejected.

4. The specific tariff sheets rejected are:

P.S.C. Mo. No. 2

3rd Revised Sheet No. 1.09A, Canceling 2nd Revised Sheet No. 1.09A

P.S.C. Mo. No. 7

5th Revised Sheet No. 5A, Canceling 4th Revised Sheet No. 5A

5th Revised Sheet No. 5B, Canceling 4th Revised Sheet No. 5B

5th Revised Sheet No. 8, Canceling 4th Revised Sheet No. 8

4th Revised Sheet No. 8A, Canceling 3rd Revised Sheet No. 8A

5th Revised Sheet No. 9A, Canceling 4th Revised Sheet No. 9A

5th Revised Sheet No. 9B, Canceling 4th Revised Sheet No. 9B

5th Revised Sheet No. 10A, Canceling 4th Revised Sheet No. 10A

5th Revised Sheet No. 10B, Canceling 4th Revised Sheet No. 10B

5th Revised Sheet No. 10C, Canceling 4th Revised Sheet No. 10C

5th Revised Sheet No. 11A, Canceling 4th Revised Sheet No. 11A

5th Revised Sheet No. 11B, Canceling 4th Revised Sheet No. 11B

5th Revised Sheet No. 11C, Canceling 4th Revised Sheet No. 11C

5th Revised Sheet No. 14A, Canceling 4th Revised Sheet No. 14A

5th Revised Sheet No. 14B, Canceling 4th Revised Sheet No. 14B

5th Revised Sheet No. 14C, Canceling 4th Revised Sheet No. 14C

5th Revised Sheet No. 17A, Canceling 4th Revised Sheet No. 17A

5th Revised Sheet No. 18A, Canceling 4th Revised Sheet No. 18A

5th Revised Sheet No. 18B, Canceling 4th Revised Sheet No. 18B

5th Revised Sheet No. 18C, Canceling 4th Revised Sheet No. 18C

5th Revised Sheet No. 19A, Canceling 4th Revised Sheet No. 19A

5th Revised Sheet No. 19B, Canceling 4th Revised Sheet No. 19B

5th Revised Sheet No. 19C, Canceling 4th Revised Sheet No. 19C

5th Revised Sheet No. 20C, Canceling 4th Revised Sheet No. 20C

4th Revised Sheet No. 28B, Canceling 3rd Revised Sheet No. 28B

5th Revised Sheet No. 30, Canceling 4th Revised Sheet No. 30

5th Revised Sheet No. 33, Canceling 4th Revised Sheet No. 33

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5th Revised Sheet No. 35, Canceling 4th Revised Sheet No. 35
5th Revised Sheet No. 35A, Canceling 4th Revised Sheet No. 35A
5th Revised Sheet No. 35B, Canceling 4th Revised Sheet No. 35B
5th Revised Sheet No. 35C, Canceling 4th Revised Sheet No. 35C
5th Revised Sheet No. 36, Canceling 4th Revised Sheet No. 36
5th Revised Sheet No. 36A, Canceling 4th Revised Sheet No. 36A
5th Revised Sheet No. 36B, Canceling 4th Revised Sheet No. 36B
5th Revised Sheet No. 37, Canceling 4th Revised Sheet No. 37
5th Revised Sheet No. 37A, Canceling 4th Revised Sheet No. 37A
5th Revised Sheet No. 37B, Canceling 4th Revised Sheet No. 37B
5th Revised Sheet No. 37C, Canceling 4th Revised Sheet No. 37C
5th Revised Sheet No. 37D, Canceling 4th Revised Sheet No. 37D
5th Revised Sheet No. 37E, Canceling 4th Revised Sheet No. 37E
5th Revised Sheet No. 37F, Canceling 4th Revised Sheet No. 37F
5th Revised Sheet No. 37G, Canceling 4th Revised Sheet No. 37G
5th Revised Sheet No. 45, Canceling 4th Revised Sheet No. 45
5th Revised Sheet No. 45A, Canceling 4th Revised Sheet No. 45A
1st Revised Sheet No. 6, Canceling Original Sheet No. 6
Sheet No. 6A, Original, New
Sheet No. 6B, Original, New
Sheet No. 6C, Original, New

5. Kansas City Power and Light Company is authorized to file tariffs in compliance with the terms of the Non-Unanimous Stipulation and Agreement.

6. Tariffs filed in accordance with Ordered Paragraph #5 shall be filed with an effective date of September 1, 2009.

7. The Non-Unanimous Stipulation and Agreement Regarding Pensions and Other Post-Employment Benefits filed on April 24, 2009, is hereby approved as the resolution of all factual issues encompassed within that Agreement in case number ER-2009-0089. A copy of the Non-Unanimous Stipulation and Agreement Regarding Pensions and Other Post-Employment Benefits is attached to this order as Appendix B.

8. The Signatories to the Non-Unanimous Stipulation and Agreement Regarding Pensions and Other Post-Employment Benefits are ordered to comply with the terms of the Agreement.

9. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are denied.

10. The prefiled testimony, including all reports, exhibits,

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appendices, schedules, etc. attached thereto, of the Signatory witnesses to the Non-Unanimous Stipulation and Agreement are received and into the case file pursuant to the Signatories' agreement. A copy of the exhibits list is attached to this order as Appendix C.

11. The evidentiary hearing that was suspended on April 21, 2009, is canceled.

12. The remainder of the procedural schedule adopted by the Commission on November 20, 2008, and subsequently modified on March 18, 2009, is canceled.

13. This order shall become effective on June 23, 2009.

Clayton, Chm., Davis, and Jarrett, CC., concur
with separate concurring opinions to follow;
Gunn, C., concurs.

Stearley, Senior Regulatory Law Judge

Appendix A. Non-Unanimous Stipulation and Agreement

(Attached)

Appendix B. Non-Unanimous Stipulation and Agreement Regarding Pensions and OPEBs

(Attached)

**Appendix C
Exhibits List**

No.	Description
1	KCPL Exh. 1 (HC) Jimmy D. Alberts -- Rebuttal
2	KCPL Exh. 1 (NP) Jimmy D. Alberts -- Rebuttal
3	KCPL Exh. 2 (HC) Wm. Edward Blunk -- Direct
4	KCPL Exh. 2 (NP) Wm. Edward Blunk -- Direct
5	KCPL Exh. 3 (HC) Wm. Edward Blunk -- Rebuttal
6	KCPL Exh. 3 (NP) Wm. Edward Blunk -- Rebuttal

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No.	Description
7	KCPL Exh. 4 Wm. Edward Blunk -- Surrebuttal
8	KCPL Exh. 5 Carl Churchman -- Direct
9	KCPL Exh. 6 (HC) Carl Churchman -- Rebuttal
10	KCPL Exh. 6 (NP) Carl Churchman -- Rebuttal
11	KCPL Exh. 7 (HC) Michael W. Cline -- Direct
12	KCPL Exh. 7 (NP) Michael W. Cline -- Direct
13	KCPL Exh. 8 (HC) Michael W. Cline -- Rebuttal
14	KCPL Exh. 8 (NP) Michael W. Cline -- Rebuttal
15	KCPL Exh. 9 (HC) Burton L. Crawford -- Direct
16	KCPL Exh. 9 (NP) Burton L. Crawford -- Direct
17	KCPL Exh. 10 Burton L. Crawford -- Rebuttal
18	KCPL Exh. 11 (HC) Burton L. Crawford -- Surrebuttal
19	KCPL Exh. 11 (NP) Burton L. Crawford -- Surrebuttal
20	KCPL Exh. 12 (HC) F. Dana Crawford -- Direct
21	KCPL Exh. 12 (NP) F. Dana Crawford -- Direct
22	KCPL Exh. 13 (HC) F. Dana Crawford -- Rebuttal
23	KCPL Exh. 13 (NP) F. Dana Crawford -- Rebuttal
24	KCPL Exh. 14 Barbara C. Curry -- Rebuttal
25	KCPL Exh. 15 Barbara C. Curry -- Surrebuttal
26	KCPL Exh. 16 (HC) Brent C. Davis -- Direct
27	KCPL Exh. 16 (NP) Brent C. Davis --Direct
28	KCPL Exh. 17 (HC) Brent C. Davis -- Rebuttal
29	KCPL Exh. 17 (NP) Brent C. Davis -- Rebuttal
30	KCPL Exh. 18 Brent C. Davis -- Surrebuttal
31	KCPL Exh. 19 Allen D. Dennis -- Direct

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No.	Description
32	KCPL Exh. 20 Allen D. Dennis -- Rebuttal
33	KCPL Exh. 21 Allen D. Dennis -- Surrebuttal
34	KCPL Exh. 22 (HC) William H. Downey -- Rebuttal
35	KCPL Exh. 22 (NP) William H. Downey -- Rebuttal
36	KCPL Exh. 23 (HC) Chris B. Giles -- Direct
37	KCPL Exh. 23 (NP) Chris B. Giles -- Direct
38	KCPL Exh. 24 (HC) Chris B. Giles -- Rebuttal
39	KCPL Exh. 24 (NP) Chris B. Giles -- Rebuttal
40	KCPL Exh. 25 Chris B. Giles -- Surrebuttal
41	KCPL Exh. 26 (HC) Samuel C. Hadaway -- Direct
42	KCPL Exh. 26 (NP) Samuel C. Hadaway -- Direct
43	KCPL Exh. 27 Samuel C. Hadaway -- Rebuttal
44	KCPL Exh. 28 Samuel C. Hadaway -- Surrebuttal
45	KCPL Exh. 29 Melissa K. Hardesty -- Rebuttal
46	KCPL Exh. 30 Melissa K. Hardesty -- Surrebuttal
47	KCPL Exh. 31 William P. Herdegen III -- Direct
48	KCPL Exh. 32 William P. Herdegen III -- Rebuttal
49	KCPL Exh. 33 Darrin R. Ives -- Direct
50	KCPL Exh. 34 Darrin R. Ives -- Rebuttal
51	KCPL Exh. 35 Darrin R. Ives -- Surrebuttal
52	KCPL Exh. 36 (HC) Steven Jones -- Rebuttal
53	KCPL Exh. 36 (NP) Steven Jones -- Rebuttal
54	KCPL Exh. 37 Larry W. Loos -- Direct
55	KCPL Exh. 38 Larry W. Loos -- Rebuttal
56	KCPL Exh. 39 Larry W. Loos -- Surrebuttal

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No.	Description
57	KCPL Exh. 40 Edward C. Matthews -- Direct
58	KCPL Exh. 41 George M. McCollister, Ph.D -- Direct
59	KCPL Exh. 42 (HC) Daniel F. Meyer -- Rebuttal
60	KCPL Exh. 42 (NP) Daniel F. Meyer -- Rebuttal
61	KCPL Exh. 43 (HC) Dr. Kris R. Nielsen -- Rebuttal
62	KCPL Exh. 43 (NP) Dr. Kris R. Nielsen -- Rebuttal
63	KCPL Exh. 44 Dr. Kris R. Nielsen -- Surrebuttal
64	KCPL Exh. 45 Paul M. Normand -- Direct
65	KCPL Exh. 46 Kenneth M. Roberts -- Direct
66	KCPL Exh. 47 (HC) Kenneth M. Roberts -- Rebuttal
67	KCPL Exh. 47 (NP) Kenneth M. Roberts -- Rebuttal
68	KCPL Exh. 48 Kenneth M. Roberts -- Surrebuttal
69	KCPL Exh. 49 Timothy M. Rush -- Direct
70	KCPL Exh. 50 Timothy M. Rush -- Rebuttal
71	KCPL Exh. 51 (HC) Michael M. Schnitzer -- Direct
72	KCPL Exh. 51 (NP) Michael M. Schnitzer -- Direct
73	KCPL Exh. 52 (HC) Michael M. Schnitzer -- Rebuttal
74	KCPL Exh. 52 (NP) Michael M. Schnitzer -- Rebuttal
75	KCPL Exh. 53 (HC) Michael M. Schnitzer -- Surrebuttal
76	KCPL Exh. 53 (NP) Michael M. Schnitzer -- Surrebuttal
77	KCPL Exh. 54 Richard A. Spring -- Direct
78	KCPL Exh. 55 (HC) John P. Weisensee -- Direct
79	KCPL Exh. 55 (NP) John P. Weisensee -- Direct
80	KCPL Exh. 56 (HC) John P. Weisensee -- Rebuttal

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No.	Description
81	KCPL Exh. 56 (NP) John P. Weisensee -- Rebuttal
82	KCPL Exh. 57 Primary Revenue Requirement Issues
83	KCPL Exh. 58 Term Sheet (Agreement in Principle)
84	Staff Exh. 1 (HC) Staff's Cost-of-Service Report for KCP&L as of February 11, 2009
85	Staff Exh. 1 (NP) Staff's Cost-of-Service Report for KCP&L as of February 11, 2009
86	Staff Exh. 2 Appendices to Staff's Cost-of-Service Report or KCP&L as of February 11, 2009
87	Staff Exh. 3 March 11, 2009 Correction page to Staff's Cost-of-Service Report for KCP&L as of February 11, 2009
88	Staff Exh. 4 Staff Accounting Schedules as of February 11, 2009
89	Staff Exh. 5 Staff's Class Cost-of-Service and Rate Design Report as of February 24, 2009
90	Staff Exh. 6 KCPL ER-2009-0089 Revenue Requirement Reconciliation filed April 15, 2009
91	Staff Exh. 7 Kofi Boateng -- Surrebuttal
92	Staff Exh. 8 Cary G. Featherstone -- Direct
93	Staff Exh. 9 Cary G. Featherstone -- Rebuttal
94	Staff Exh. 10 (HC) Cary G. Featherstone -- Surrebuttal
95	Staff Exh. 10 (NP) Cary G. Featherstone -- Surrebuttal
96	Staff Exh. 11 (HC) V. William Harris -- Rebuttal
97	Staff Exh. 11 (NP) V. William Harris -- Rebuttal
98	Staff Exh. 12 (HC) V. William Harris -- Surrebuttal
99	Staff Exh. 12 (NP) V. William Harris -- Surrebuttal
100	Staff Exh. 13 (HC) Paul R. Harrison -- Surrebuttal
101	Staff Exh. 13 (NP) Paul R. Harrison -- Surrebuttal
102	Staff Exh. 14 Karen Herrington -- Rebuttal

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No.	Description
103	Staff Exh. 15 (HC) Karen Herrington -- Surrebuttal
104	Staff Exh. 15 (NP) Karen Herrington -- Surrebuttal
105	Staff Exh. 16 Charles R. Hyneman -- Rebuttal
106	Staff Exh. 17 (HC) Charles R. Hyneman -- Surrebuttal
107	Staff Exh. 17 (NP) Charles R. Hyneman -- Surrebuttal
108	Staff Exh. 18 Lisa Kremer -- Surrebuttal
109	Staff Exh. 19 Keith Majors -- Rebuttal
110	Staff Exh. 20 Keith Majors -- Surrebuttal
111	Staff Exh. 21 David Murray -- Rebuttal
112	Staff Exh. 22 David Murray -- Surrebuttal
113	Staff Exh. 23 Bret Prenger -- Surrebuttal
114	Staff Exh. 24 (HC) Michael Proctor -- Rebuttal
115	Staff Exh. 24 (NP) Michael Proctor -- Rebuttal
116	Staff Exh. 25 (HC) Michael Proctor -- Surrebuttal
117	Staff Exh. 25 (NP) Michael Proctor -- Surrebuttal
118	Staff Exh. 26 Anne Ross -- Replacement Rebuttal
119	Staff Exh. 27 (HC) Robert Schallenberg -- Surrebuttal
120	Staff Exh. 27 (NP) Robert Schallenberg -- Surrebuttal
121	Staff Exh. 28 Michael Scheperle -- Direct
122	Staff Exh. 29 Michael Scheperle -- Rebuttal
123	Staff Exh. 30 Michael Scheperle -- Surrebuttal
124	Staff Exh. 31 Michael Taylor -- Surrebuttal
125	Staff Exh. 32 Curt Wells -- Direct
126	OPC Exh. 1 Mike Gorman -- Direct
127	OPC Exh. 2 Mike Gorman -- Rebuttal

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No.	Description
128	OPC Exh. 3 Mike Gorman -- Surrebuttal
129	OPC Exh. 4 Russ Trippensee -- Direct
130	OPC Exh. 5 Russ Trippensee -- Rebuttal
131	OPC Exh. 6 Barb Meisenheimer -- Direct (Rate Design)
132	OPC Exh. 7 Barb Meisenheimer -- Rebuttal (Revenue Requirement)
133	OPC Exh. 8 Barb Meisenheimer -- Surrebuttal (Rate Design & Revenue Requirement)
134	OPC Exh. 9 Ryan Kind -- Rebuttal
135	DOE/NNSA Exh. 1 Jatinder Kumar -- Direct
136	DOE/NNSA Exh. 2 (HC) Jatinder Kumar -- Direct
137	DOE/NNSA Exh. 3 Jatinder Kumar -- Rebuttal
138	DOE/NNSA Exh. 4 (HC) Jatinder Kumar -- Rebuttal
139	DOE/NNSA Exh. 5 Jatinder Kumar -- Surrebuttal
140	DOE/NNSA Exh. 6 (HC) Jatinder Kumar -- Surrebuttal
141	Industrials Exh. 1 Maurice Brubaker -- Direct (Rate Design)
142	Industrials Exh. 2 Maurice Brubaker -- Rebuttal (Revenue Requirement)
143	Industrials Exh. 3 Greg Meyer -- Rebuttal
144	Industrials Exh. 4 Maurice Brubaker -- Rebuttal (Rate Design)
145	Industrials Exh. 5 Maurice Brubaker -- Surrebuttal (Rate Design)
146	MDNR Exh.1 Laura Wolfe -- Direct
147	MDNR Exh.2 Laura Wolfe -- Surrebuttal
148	MDNR Exh.3 Quantec Energy Economics: "Assessment of Energy and Capacity Savings Potential in Iowa, Vol. II," Portland., OR. February 2008. Appendix G

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No.	Description
149	MDNR Exh.4 http://www.dps.state.ny.us/NY_Standard_Approach_for_Estimating_Energy_Savings_12-08.pdf
150	MDNR Exh.5 Efficiency Vermont Technical Reference User Manual (TRM) No. 2009-54

NOTE: The Stipulation & Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III

This Commissioner concurs with the majority's Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case Nos. ER-2009-0089 and ER-2009-0090, as well as its Order Approving Unanimous Stipulation and Agreement in Case No. HR-2009-0092, all three of which are rate cases filed by Great Plains Energy. The cases include the general rate proceeding for the Kansas City Power & Light service territory, the areas formerly served by Aquila Networks for electric service in both St. Joseph Light and Power (L&P) and Missouri Public Service (MPS) areas and the area formerly served by Aquila Networks for steam or heating service. The global settlements reached in these cases resulted from extensive negotiations among nearly all stakeholders in an agreement that includes incorporation into rates of significant investments in new environmental upgrades to facilities at plants known as Iatan 1, Jeffrey Energy Center, and Sibley Generating Facility. The settlements also acknowledge the unfortunate need to significantly raise electric and steam rates relative to those investments that will have a direct impact on customer budgets. Although the electric rates do not take effect until September 1, 2009, the Commission is mindful that given the state of the economy customers will consider this a terrible time to raise utility rates, even if this increase was planned for and expected.

The Commission has little choice but to approve the agreements, which are supported by the Public Counsel, the PSC Staff, several government agencies, other diverse stakeholders and it is not opposed by numerous industrial customers. Even though the agreements result in rate increases, the process has culminated in a global settlement with participation and endorsement of the rate payer advocates as well as the utility, suggesting reasonableness of the result. These rate increases

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are not simply raising the return or profit margin allowed to the company but instead represent significant investments in plant that will benefit the public and the environment through reductions in emissions. Environmental mandates have required the investment in infrastructure that will improve the air quality in the vicinity of these facilities.

These rate increases were also contemplated in, and planned for in, KCPL's Experimental Regulatory Plan, which was the product of year-long, extensive, good faith negotiations and represent the consensus of a large, diverse group of interests in Case No. EO-2005-0329. The parties each had access to highly qualified subject matter experts, including accountants, economists and engineers, and filed extensive testimony outlining their respective analyses and positions prior to the signatories reaching a consensus as to the reasonableness of the Agreements and all of their elements.

This rate increase reflects an across the board increase of 16.1% in the KCPL service territory, a 10.46% increase in the Missouri Public Service service territory, an 11.85% increase in the St. Joe Light and Power service territory. These are significant rate increases that will certainly have an impact on customers in their respective territories, and the impact on those customers is not to be taken lightly.

Rate payers should be aware that these increases are not the last in the foreseeable future considering that in 2010, it is planned that nearly the entire investment in Unit 2 will be placed into rate base causing another potential rate increase. Large investments in plant which are necessary for the provision of service result in significant rate increases. Rate payers should take solace that the PSC Staff and Public Counsel's review of the expenditures, in the planning process for new environmental upgrades and new generation, have found these costs to be prudent and reasonable and that the Commission found them to be necessary for the public interest. The Commission must and will take additional steps at helping customers take control of their utility bills through aggressive energy efficiency programs, empower customers with information to make wise energy choices and embrace new technologies such as customer owned generation and smart grid improvements in a rapidly changing energy environment. We must also take steps at improving programs for low-income customers who remain vulnerable to disconnection. Lastly, with additional future increases on the horizon, from additions of new generation and climate change legislation, we must be prepared at retaining and attracting industry that depend on Missouri low cost power.

For the foregoing reasons, this Commissioner concurs.

**CONCURRING OPINION OF
COMMISSIONER TERRY M. JARRETT**

I applaud the parties for negotiating proposed settlements in these cases and saving the time and expense of holding weeks of evidentiary hearings. I also fully support the results reached in the Orders issued by the Commission in these cases. However, I write separately to raise my serious concern regarding the overall structure and content of the Commission Orders themselves.

The Commission's statutory duties are not diminished or mitigated simply because the parties have proposed stipulations and agreements. This includes not only preparing and issuing Orders that are legally sufficient, but also ensuring that the Commission not merely accept settlements for settlements sake. *In the Matter of WPC Sewer Company's Small Company Rate Increase*, File No. SR-2008-0388, I stated the following, which bears repeating here:

“ [...] the United States Supreme Court made clear that the controlling test in determining “just and reasonable” rates is the end result¹ and not the method of reaching that result. [...] As regulators, we must not lose sight of our ultimate responsibility, which is determining just and reasonable rates that are in the public interest, while also ensuring safe and reliable service. **Only the Commissioners make that final determination, which is why a unanimous stipulation presented to the Commission is nothing more than a “proposed” resolution.**”² A stipulation is only a suggestion as to the disposition of some or all of the issues pertaining to the utility's revenue increase request that the Commission considers in

¹ This case established the doctrine of the “end result.” *The Regulation of Public Utilities, Theory and Practice*, 3rd Ed. Charles F. Phillips, Jr., pg. 181, 1993.

² 4 CSR 240-3.050(10) (*emphasis added*).

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determining whether the result is just
and reasonable rates.

(Emphasis in the original and added.). The parties to a case have no authority to determine or conclude that just and reasonable rates are achieved through settlement, or that the settlement ensures safe and adequate service. This determination is the Commission's to make and it is the Commission's *choice* as to whether to accept or reject a proposed stipulation and agreement. The Commission has rejected numerous stipulated settlements in the past, and no party, utility, consumer, ratepayer, shareholder or any person with any interest in the outcome of the matters before this regulatory body should ever conclude that this Commission is left with *little or no choice* in the matters that come before it.³ The viewpoint that because a case is settled - or that a case has a low appeal probability - diminishes or even relieves the

³ *The Staff of the Missouri Public Service Comm'n v. Lockheed Martin Global Telecommunications Services*, Case No. TC-2004-0415, and, *In the Matter of Lockheed Martin Global Telecommunications Services, Inc.'s 2002 Annual Report to the Commission as an Interexchange Telecommunications Carrier*, Case No. XE-2004-0488, 2004 WL 2016229 (Mo. P.S.C. 2004), Order Rejecting Stipulation and Agreement, issued September 12, 2004 (similar cases pending in the circuit court require rejection); *In re Missouri RSA No. 5 Partnership, dba Chariton Valley Wireless*, Case No. TK-2005-0304, 2005 WL 1719375 (Mo. P.S.C. 2005), Amended Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In re Chariton Valley Communications Corporation, Inc.*, Case No. TK-2005-0300, 2005 WL 1719378 (Mo. P.S.C. 2005), Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, and, *In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584, 2004 WL 1824101 (Mo. P.S.C. 2005), Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention, issued July 27, 2004 (the Commission, complying with its statutory mandate under the Telecommunications Act, is unable to determine if the negotiated agreement is discriminatory and must reject it as not being in the public interest); *Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc.*, Case No. MC-2004-0271, 2004 WL 1813292 (Mo. P.S.C. 2004), Order Rejecting Stipulated Agreement and Setting Prehearing Conference, issued July 8, 2004 (negotiated agreement is not structured in a manner consistent with the public interest); *In re St. Joseph Light and Power Company*, Case No. ER-93-41 and, Case No. EC-93-252, 1993 WL 449447 (Mo. P.S.C. 1993), Report and Order, issued June 25, 1993, (Commission rejected proposed settlement agreement between its Staff and SJLPC on the issue of rate design finding it to be inconsistent with prior Commission Order in Case No. EO-88-158).

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Commission of its duty, is misguided and contrary to current law.

I believe that these Orders do not comply with legal requirements regarding “findings of fact” and as such, the Orders should be withdrawn by the Commission and rewritten to fully comply with the law. The Commission is bound by its statutory obligations, and controlling opinions of the appellate courts. This means that the Commission must ensure that its Orders are not merely recitations of conclusions drawn by the parties, but instead are based on facts which the Commission independently and impartially has found supportive of its conclusions. Orders must provide sufficient analysis so that they provide the Commission’s reasoning not only to those that the Commission regulates, but also to reviewing courts, parties, the public, and even individuals that might have a reason to study or review Commission orders.

The recent tendency of this Commission to editorially streamline the Orders it issues in cases where the parties have reached either a unanimous or non-unanimous settlement proposal is unfortunate. This is a trap into which the Commission has fallen before, and I am compelled to reiterate what the appellate courts of this state have repeatedly made clear to the Commission - that is that in all written Commission “reports”, inclusion of findings of fact are required. *State ex rel. Rice v. Public Service Comm’n et al.*, 220 S.W.2d 61, 65 (1949). In *State ex rel. Monsanto Company v. Public Service Comm’n, et al.*, 716 S.W.2d 791 (Mo. Banc 1986) the Commission staff conceded that this requirement is embodied in Section 386.420(2) RSMo (2000) (formerly, § 5688 RSMo 1939). Any contention that written findings of fact in Commission Orders are unnecessary is not consistent with statute and flies in the face of the directives of this state’s appellate courts.

Even though Section 536.090 RSMo states that every decision and Order in a contested case shall include or be accompanied by findings of fact and conclusions of law which shall be stated separately “except in default cases or cases disposed of by stipulation, consent order or agreed settlement”, this *does not* eliminate the obligation of the Commission to make findings, and further, describe those findings in its Orders. This point was announced in *Rice*, and later upheld by *Fischer v. Public Service Comm’n*, 645 S.W. 39 (Mo. App. W.D. 1982). *Fischer*, as a case which was settled by stipulation and agreement, controls this Commission regarding the application of 536.090 RSMo, and the requirements for the Orders in these cases. *Fischer* held that the inclusion of findings of fact in Commission Orders is not a matter of style

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but is a *legal requirement*. *Id.* at 44. Missouri Courts interpreting Section 386.420 have held that in contested cases (i.e. proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing), the Commission must include findings of fact in its written reports.⁴ Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. In these cases, this has not occurred.⁵

An Order can be insufficient as to findings of fact in at least two ways: (1) clear omission of findings of fact, and (2) the failure of purported findings of fact to actually constitute “findings of fact.” In *State of Missouri, ex. rel. Noranda Aluminum, Inc. v. Public Service Comm’n*, 24 S.W.3d 243, 245 (Mo. App. W.D. 2000), a Commission Order that purported to contain “extensive findings of fact”, “including more than 27 pages”, was found to be nothing more than “a general discussion of the parties’ positions and a brief explanation of which position the commission deemed correct.” The *Noranda* Court was especially harsh on the Commission’s failure to follow the Court’s prior directives:

The Commission apparently ignored our admonition to one [sic] its sister administrative agencies: [M]erely reciting the testimony ... does not establish which of the facts set forth in the [recitation] the [agency] found to be true. [An agency] must make unequivocal, affirmative findings of the facts. *Parrot v. HQ, Inc.*, 907 S.W.2d 236, 244 (Mo. App. 1995). *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655, 661 (Mo. App. 1997). [Mere recitation of

⁴ Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm’n of Missouri*, 716 S.W.2d 791, 794-796 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm’n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm’n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article V, Section 18, however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel v. Public Serv. Comm’n*, 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffman v. Public Serv. Comm’n*, 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm’n*, 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

⁵ *Id.*

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testimony] is of no help to us in determining what facts the [agency] found. It provides nothing for a meaningful judicial review. Nor did the Commission seem to note our earlier admonition that, “[w]ithout specific findings of fact ..., it is impossible to determine whether the action of the [agency] was supported by substantial evidence.” *Webb v. Board of Police Commissioners of Kansas City*, 694 S.W. 2d 927, 929 (Mo. App. 1985)

State of Missouri, ex rel. v. Noranda Aluminum, Inc., 24 S.W.3d 243, 246 (Mo. App. W.D. 2000). Unfortunately, this Commission continues to ignore the clear directives of the Court of Appeals. It appears to me that the Commission’s Orders in these cases rely solely on *legal conclusions* propounded by parties as a way to bootstrap the conclusions reached in the Orders. Accordingly, the Orders include no written factual basis for support.

Neither the Staff of the Commission, or any party appearing before the Commission, possess the statutory authority to make *legal* conclusions regarding “just and reasonable rates”. That authority was granted by the legislature to the Commission, and the Commission alone.⁶ It is well settled that parties may not stipulate to conclusions of law.⁷ As in *Noranda*, the absence of “nonconclusory facts” to support the Order was found unacceptable, which is why here in these cases, the Commission should, upon its own motion, withdraw these Orders and have them rewritten to conform to the appropriate legal standard. New Orders must therefore state which facts on which the Commission has based its decisions to approve the agreements, lest this Commission be left to future admonishments by the appellate courts.

In addition to believing that the Commission should, upon its own motion, withdraw the Orders for revision to include findings of fact, I also believe that the Commission should initiate a rulemaking to amend 4

⁶ Section 393.130 RSMo.

⁷ Litigants cannot stipulate as to questions of law. *State v. Biddler*, 599 S.W.2d 182, 186 and n.4 (Mo. Banc 1980). Further, the Commission must independently and impartially review the facts of any case. *Kennedy v. Missouri Real Estate Comm’n*, 762 S.W.2d 454, 457 (Mo. App. E.D. 1988).

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CSR 240-2.115 to: (1) provide clear guidance that findings of fact shall be included in Commission Orders in cases of stipulations and agreements; and (2) require parties to file proposed findings of facts and conclusions of law with any proposed stipulation and agreement they submit to the Commission for approval.

The Commission should not streamline its Orders at the expense of legal sufficiency, but should instead strive to ensure that every Order will pass legal muster specifically as to whether the findings of fact and conclusions of law are sufficient.⁸ Because deciding whether rates are just and reasonable is a *conclusion of law*, the Commission must independently and impartially review the facts of any case, including these cases where a proposed stipulation and agreement has been submitted for consideration. Here, I do not believe that the written Orders in these cases adequately detail that the Commission made such an independent and impartial review. I am by no means implying that such an independent and impartial review did not take place; in fact, this Commissioner did perform an independent and impartial review of the facts in these cases. Based upon my review of the proposed agreements, relevant testimony in the record, and arguments presented at the June 8, 2009, stipulation hearing, I have made an independent conclusion that the agreements proposed, and in all respects provide, just and reasonable rates that are in the public interest, while ensuring safe and adequate service.

Therefore, despite my concerns about the form of the Orders, I concur.

⁸ *Deaconess Manor Ass'n v. Public Service Comm'n of State of Mo.*, 994 S.W. 2d 602 (Mo. App. W.D. 1999).

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In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service

Case No. ER-2009-0090

Decided June 10, 2009

Electric §20. The Commission approved a stipulation and agreement that resolved KCP&L Greater Missouri Operations Company's request for a general rate increase.

ORDER APPROVING NON-UNANIMOUS STIPULATIONS AND AGREEMENTS AND AUTHORIZING TARIFF FILING

Syllabus

This order approves the Non-Unanimous Stipulation and Agreement executed by KCP&L Greater Missouri Operations Company ("GMO"), the Staff of the Missouri Public Service Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), the Missouri Department of Natural Resources ("MDNR"), and Dogwood Energy, LLC ("Dogwood") to resolve all issues in this case ("Global Agreement") with the exception of the pension cost issue.¹ This order further approves the Non-Unanimous Stipulation and Agreement Regarding Pensions executed by GMO and Staff ("Pension Agreement").² This agreement purports to resolve pension costs for GMO as of April 30, 2009. The order also rejects GMO's initial tariff filing and authorizes GMO to file tariffs in compliance with the Non-Unanimous Stipulation and

¹ The parties who are non-signatories to the Global Agreement are the United States Department of Energy, the National Nuclear Security Administration, and the Federal Executive Agencies (collectively referred to as "the Federal Executive Agencies"); Ag Processing, Inc.; Wal-Mart Stores, Inc.; the Sedalia Industrial Energy Users Association ("SIEUA") consisting of Pittsburgh Corning Corporation, Waterloo Industries, Hayes-Lemmerz International, EnerSys Inc., Alcan Cable Co., Gardner Denver Corporation, American Compressed Steel Corporation, Stahl Specialty Company; Union Electric Company, d/b/a AmerenUE; the City of Kansas City; International Brotherhood of Electrical Workers Local Nos. 1464, 1613, and 412; and Bothwell Regional Health Center, Community Hospital Association, Inc., Lee's Summit Medical Center, Liberty Hospital, Research Belton Hospital, Royal Oaks Hospital, Saint Luke's Northland Hospital - Smithville Campus, St. Francis Hospital and Health Services, Saint Luke's East - Lee's Summit, St. Mary's Medical Center (collectively referred to as "the Hospital Intervenors").

² The Global Agreement and the Pension Agreement may also be referred to throughout this Order singularly or collectively as an "Agreement" or as the "Agreements."

Agreement.

I. Procedural History

On September 5, 2008, GMO submitted to the Commission proposed tariff sheets intended to implement a general rate increase for electrical service provided in its Missouri service area. The proposed tariff sheets were assigned tariff file number JE-2009-0193 and bear an effective date of August 5, 2009.

According to GMO's application, the tariff sheets were designed to produce an annual increase of \$66 million in GMO's Missouri jurisdictional revenues for its operations serving the territory formerly served as Aquila Networks-MPS ("MPS") and \$17.1 million in GMO's Missouri jurisdictional revenues for the operations serving the territory formerly served as Aquila Networks-L&P ("L&P").

On September 12, 2008, the Commission issued notice and set a deadline for intervention requests. The Commission granted requests for intervention to Dogwood; Ag Processing, Inc.; SIEUA; AmerenUE; the Federal Executive Agencies; the City of Kansas City, Missouri; Wal-Mart Stores, Inc.; the IBEW Local Nos. 1464, 1613, and 412; and the Hospital Intervenors.

On November 20, 2008, the Commission set the procedural schedule. This schedule included an evidentiary hearing scheduled for May 11–15, 2009, and a True-Up hearing scheduled for June 1–2, 2009.

On March 2, 2009, GMO filed a status report and motion to extend the end of the True-Up period from March 31, 2009 with regard to latan 1 until April 30, 2009, to allow for the timing of the latan 1 Air Quality Control System ("AQCS") equipment satisfying the in-service criteria.³ The request for this delay stemmed from repairs that were required to the rotor shaft of the new high-pressure turbine that failed its start-up testing on February 4, 2009.⁴ As an alternative to only extending the True-Up period, GMO offered to extend all deadlines in the procedural scheduled by 30 days, including voluntary extension of the effective date for its tariffs or until September 5, 2009. On March 18, 2009, the Commission granted GMO's alternative request to extend all of the True-Up proceedings and the True-Up hearing was reset for July 1-2, 2009.⁵

³ Status Report and Motion to Extend Period to Demonstrate Compliance with Certain In-Service Criteria of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company, filed March 2, 2009.

⁴ Notice Concerning Start-Up Issues at latan Unit 1, filed February 11, 2009.

⁵ Order Modifying Procedural Schedules For True-Up Proceedings and Formally Adopting

The Commission held local public hearings in Lee's Summit, Sedalia, St. Joseph, Marshall, Carrollton, Nevada, and two separate hearings in Kansas City, Missouri.⁶ The Commission utilized the same locations and times to conduct combined local public hearings for ER-2009-0089, ER-2009-0090, and HR-2009-0092.

The evidentiary hearing commenced on May 11, 2009. Once preliminary matters were complete, the parties requested a recess to engage in settlement negotiations. Following completion of the negotiations, the Signatories to the Agreements indicated that they had reached an agreement in principle and announced their intention to memorialize a Non-Unanimous Stipulation and Agreement and file it with the Commission. Consequently, the Commission suspended the remainder of the evidentiary hearing to allow for the filing of the Agreements and for responses or objections.⁷

On May 22, 2009, GMO filed the Agreements. Deadlines were set for responses, suggestions supporting the agreements and replies to the suggestions.⁸ No party objected to either of the Agreements and no party requested that the evidentiary hearing be resumed to hear any issue.

On June 8, 2009, the Commission convened a hearing for the formal presentation of the Agreements and to direct questions about the Agreements to the parties' counsel and subject matter experts. At the hearing, the Commission directed specific questions regarding the Agreement to the parties' counsel and to their subject matter witnesses.⁹ The Commission did not order briefs and closed the recording of all evidence at the conclusion of the stipulation hearing on June 8, 2009.

II. The Agreements

The Global Agreement, when combined with the Pension Agreement, purports to resolve all issues in this matter.¹⁰ The Global

Test Year And Update Period, issued March 18, 2009. See also, Order Rescinding Conditions Imposed in the Commission's Order Modifying Procedural Schedules for True-Up Proceedings, issued April 15, 2009.

⁶ Order Setting Public Comment Hearings, issued January 6, 2009; Order Rescheduling Public Comment Hearings, issued January 16, 2009; Notice Regarding Requests for Additional Local Public Hearings, filed February 25, 2009; Order Expanding Access To Public Comment Hearings, issued February 25, 2009.

⁷ Transcript, Volume 11.

⁸ Order Granting Additional Time to File Stipulation and Agreement, issued May 18, 2009.

⁹ Transcript, Volume 12.

¹⁰ *Non-Unanimous Stipulation and Agreement*, filed on May 22, 2009. The Global Agreement is attached to this order as Appendix A.

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Agreement addresses the following topics: (1) Revenue Requirement, (2) Rate Design, (3) Customer Class Cost of Service Study, (4) Vegetation Management and Infrastructure Inspection, (5) Prudence and In-Service Timing of Iatan I, (6) Allocations of Common Plant for Iatan 1 and 2, (7) Allowance for Funds Used During Construction Rate for Iatan 2, (8) Crossroads, (9) Sibley and Jeffrey Air Quality Control System Equipment, (10) Economic Relief Pilot Program, (11) Allocation of Off-System Sales and Staff's Methodology for Fuel and Purchased Power Allocations Between MPS and L&P, (12) Income Tax Cost of Removal, (13) Maintenance Expenses, (14) Demand-Side Management, (15) Supplemental Weatherization and Minor Home Repair Program, (16) Low Income/Weatherization Issues, (17) Pension Agreement, and (18) Fuel Adjustment Clause.

Among other provisions, the Global Agreement provides that GMO should be authorized to file revised tariff sheets containing new rate schedules for electric service designed to produce overall Missouri jurisdictional gross annual electric revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, in the amount of \$48.0 million for its MPS territory and \$15.0 million for its L&P territory. The Global Agreement provides that these revenues shall be for electric service rendered on and after September 1, 2009, provided that the Iatan I Air Quality Control System ("AQCS") facilities meet the Staff's in-service criteria by May 30, 2009.¹¹ The Global Agreement also establishes the rate design as an equal percentage, across-the-board basis for each rate class.

The Pension Agreement reached by GMO and Staff resolves the amount of pension costs for GMO as of April 30, 2009, and the appropriate accounting treatment of the pension cost for ratemaking purposes. GMO and Staff agreed to the specific amounts for pension cost to be included in electric jurisdictional rates for both the MPS and the L&P service territories. Staff and GMO also agreed to the various accounting trackers and specific accounts to be used for each of the service territories and the specific amounts to be set out in rate base.¹²

Both Agreements include a contingent waiver of rights indicating that if the Commission approves in whole the Global and Pension Agreements, the Signatories agreed to waive their rights to call and

¹¹ The in-service criteria is attached to the prefiled direct testimony of Brent Davis as Schedule BCD-2 in Case No. ER-2009-0089.

¹² Nonunanimous Stipulation and Agreement Regarding Pensions, filed May 22, 2009, paras. 1-4.

cross-examine witnesses,¹³ to present oral argument and written briefs,¹⁴ and to judicial review.¹⁵

By submitting the Agreements for consideration by the Commission, the Signatories jointly recommend that the Commission accept the Agreements as a fair compromise of their respective positions on the issues in this matter.¹⁶ The Signatories negotiated the various terms of these provisions and no other party has objected or sought a hearing with respect to any of these provisions. There are no disputed issues between the parties with regard to the provisions of the Agreements.

III. Relevant Legal Standards

A. Jurisdiction

GMO is an “electrical corporation” and a “public utility,” as defined in Sections 386.020(15) and (43), respectively, and is subject to the personal jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. GMO’s rate increase request falls under the Commission’s subject matter jurisdiction pursuant to Section 393.150.

Additionally, Section 393.130 mandates that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable. GMO filed its application pursuant to Commission Rules 4 CSR 240-2.060, 3.030, and 3.160. These rules outline the minimum filing requirements for GMO to pursue its rate increase request.

B. Standards for Approving Stipulations and Agreements

The Commission has the legal authority to accept a Stipulation and Agreement as offered by the parties as a resolution of the issues raised in this case.¹⁷

In reviewing the Agreement, the Commission notes:

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.¹⁸

¹³ Section 536.070(2).

¹⁴ Section 536.080.1.

¹⁵ Section 386.510.

¹⁶ *Id.*

¹⁷ Section 536.060, RSMo; and 4 CSR 240-2.115(1)(B).

¹⁸ Section 536.090, RSMo. This provision applies to the Public Service Commission. *State*

A stipulation and agreement that is entered into by fewer than all parties to a case is deemed to be a nonunanimous stipulation and agreement.¹⁹ Each party is given seven days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement, and failure to file a timely objection constitutes a full waiver of that party's right to a hearing.²⁰

No party objected to the Agreements within the deadlines set by the Commission.²¹ Consequently, pursuant to the Commission's rules, the Agreement shall be treated as though they are unanimous and the Non-Signatory Parties are deemed to have waived their right to a hearing on any issue in this matter. Should the Commission find that the terms of the Global Agreement and the Pension Agreement are lawful and just and reasonable, the Commission may approve the Agreements as a resolution of all factual issues in this matter.

IV. Discussion

A. Introduction

This case illustrates one of the most important public policy questions faced by this Commission: What is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers and ensuring that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have an opportunity to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure?²² As already noted, both of these objectives are statutory duties of this Commission.

The Commission recognizes that the recommended revenue requirement presented in the Agreements is not a trivial amount of money to customers like those who testified at the public hearings. The increased cost of all utilities along with the recent rise in food costs, gasoline prices, and healthcare costs have had an effect on customers' ability to keep current on their bills. That being said, the Commission also recognizes that the Agreements before the Commission resulted from extensive negotiations between parties with diverse interests and the Commission's neutral Staff. Local Public Hearings were held to

ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri, 976 S.W.2d 485, 496 (Mo. App. 1998).

¹⁹ 4 CSR-240-2.115(2)(A).

²⁰ 4 CSR 240-2.115(2)(B).

²¹ 4 CSR 240-2.115(2)(D).

²² See generally, Section 386.610, RSMo 2000.

receive public comment on the proposed rate increase, and Public Counsel was an active party to ensure the rights of the ratepaying public.

Subject matter experts, including accountants, economists and engineers, filed extensive testimony outlining their respective analyses and positions prior to the Signatories reaching a consensus as to the reasonableness of the Agreements and all of their elements. The Signatories agree, and the Non-Signatories did not object, to the conclusion that the proposed revenue and rate design set out in the Agreement are just and reasonable.

The Commission further notes that no party has objected to the proposed annual revenue requirement, or to any component of any calculations, allocations, negotiations or compromise resulting in the proposed annual revenue requirement as set forth in the Global Agreement. No party has objected to the use of any determinants or to any Class Cost of Service allocation factors or any other billing determinants utilized for the purpose of determining rate design in the Global Agreement.

No party has objected to the miscellaneous provisions, or to any component of any calculations, negotiations or compromise resulting in determining the miscellaneous provisions as set forth in the Global Agreement. Similarly, no party has objected, in any way, to any component of any calculations, negotiations or compromise resulting in determining the provisions of the Pension Agreement. And finally, no party requested a hearing on any issue related to the determination of the proposed annual revenue requirement, rate design, or any other provision set forth in either of the Agreements.

B. Revenue Requirement

GMO has compromised on its requested revenue requirement by entering into the Agreements and recommending to the Commission that its authorized revenue requirement in this case represents an increase in revenues associated with its electric service of \$48 million for its MPS division and \$15 million for its L&P division. This proposed revenue requirement is advocated for by Staff, Public Counsel, MDNR, and Dogwood.

The Reconciliation filed in this case reveals that the parties initially had differing positions on rate base, revenue, expenses, depreciation, and taxes, as well as the many components and allocations that determine these factors. Indeed, as the Commission has recognized many times, the complexity of the issues and the number of parties often involved in rate cases can be staggering. Parties regularly

engage in settlement negotiations, sometimes, as in this case, resolving their disputes with “black box” settlements. That is to say, the many parties arrive at, for example, a final revenue requirement number that they all find acceptable. But that settlement does not reveal how the parties arrived at that number, who moved how many dollars on what issue, etc.

Regardless, the Commission determines that the proposed increase in overall Missouri gross annual electric revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or similar fees or taxes, of \$48 million for the MPS service area and \$15 million for the L&P service area, effective for electric services rendered on and after September 1, 2009, as conditioned by the requirement that the Iatan I Air Quality Control System facilities meet Staff’s in-service criteria by May 30, 2009, is just and reasonable.²³

This revenue requirement is no more than is sufficient to keep GMO’s utility plants in proper repair for effective public service, and insure to GMO’s investors a reasonable return upon funds invested. The Commission approves the Global Agreement and the Pension Agreement as to GMO’s annual revenue requirement, in all respects, as encompassed in those Agreements.

C. Rate Design

No party opposed the rate design as articulated in the Agreements. The Signatories agreed to an equal percentage, across-the-board, spread of the rate increase within each rate class.

The Commission has previously found that the approach of using equal percentage, across-the-board, rate increases essentially maintains the same rate design as exists and that is presently lawful and approved.²⁴ Consequently, the Commission determines that the equal percentage across-the-board, rate increases to individual customer classes, as contemplated by the Agreements, are just and reasonable.

With regard to the proposed adjustments, having examined the respective positions of the parties who presented positions on rate design and recognizing that all of those parties agreed certain

²³ GMO satisfied the Global Agreement’s condition that the Iatan I AQCS facilities meet the Staff’s in-service criteria by May 30, 2009. See Transcript, Volume 12.

²⁴ See Case No. ER-2007-0291, In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan., Report and Order, p. 67. See also *In re The Empire District Electric Company*, Commission Case No. ER-2001-299, Report and Order, p. 21, issued September 20, 2001.

adjustments needed to be made to the various rate classes, the Commission concludes that the Signatories' compromise on these adjustments affirmatively demonstrates they are just and reasonable adjustments. Further, no party has objected to any determinants or factors utilized for the purpose of determining the rate design in the Agreements, again demonstrating to the Commission that this portion of rate design is just and reasonable. The Commission shall approve the Agreements as to rate design, in all respects.

D. Miscellaneous Provisions to the Agreements

After reviewing the remainder of the items encompassed in the Global Agreement and the Pension Agreement, as outlined above, and the parties' positions on, or lack of position on, those items, the Commission finds the proposed items to be reasonable as adjunctive provisions of the Agreements. These remaining items proposed in the Agreements, as previously outlined, are acceptable to all concerned parties as evidenced by these parties being either a Signatory to the Agreements or not having objected to these provisions.

The Commission concludes that none of these adjunct provisions to the Agreement are contrary to any statute or rule, or in any way violate the public interest. The Commission shall approve all of the miscellaneous provisions encompassed in both Agreements.

E. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.²⁵ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.²⁶

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.²⁷ "In all

²⁵ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

²⁶ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

²⁷ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992).

events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”²⁸

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, consistent with the Commission’s statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

V. Decision

By submitting the Agreements for consideration by the Commission, the Signatories jointly recommend that the Commission accept the Agreements as a fair compromise of their respective positions on the issues in this matter. Based on the Agreements, the testimony received at the local public hearings, the testimony, comments, and positions presented at the stipulation hearing, the Commission finds that the parties have reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service. Accordingly, the Commission shall authorize GMO to file tariffs in compliance with the Agreements. The parties shall be directed to comply with the terms of the Global Agreement and the Pension Agreement.

The Commission shall, as agreed to by the Signatories, admit, without modification or condition, the prefiled testimony (including all exhibits, appendices, schedules, etc. attached thereto) of all Signatories’ witnesses.

THE COMMISSION ORDERS THAT:

1. The Non-Unanimous Stipulation and Agreement filed on May 22, 2009, is hereby approved as the resolution of all factual issues encompassed within that Agreement in case number ER-2009-0090. A copy of the Non-Unanimous Stipulation and Agreement is attached to this order as Appendix A.

2. The Signatories to the Non-Unanimous Stipulation and Agreement are ordered to comply with the terms of the Agreement.

²⁸ *State ex rel. Gulf Transport Co. v. Public Serv. Comm’n*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S. Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Serv. Comm’n*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Serv. Comm’n*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); Sections 386.490 and 386.510.

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3. The proposed electric service tariff sheets (JE-2009-0193) submitted on September 5, 2008, by KCP&L Greater Missouri Operations Company for the purpose of increasing rates for electric service to retail customers are hereby rejected.

4. The specific tariff sheets rejected are:

P.S.C. MO. No. 1

3rd Revised Sheet No. 18, Canceling 2nd Revised Sheet No. 18
3rd Revised Sheet No. 19, Canceling 2nd Revised Sheet No. 19
3rd Revised Sheet No. 21, Canceling 2nd Revised Sheet No. 21
3rd Revised Sheet No. 22, Canceling 2nd Revised Sheet No. 22
3rd Revised Sheet No. 23, Canceling 2nd Revised Sheet No. 23
3rd Revised Sheet No. 24, Canceling 2nd Revised Sheet No. 24
3rd Revised Sheet No. 25, Canceling 2nd Revised Sheet No. 25
3rd Revised Sheet No. 28, Canceling 2nd Revised Sheet No. 28
3rd Revised Sheet No. 29, Canceling 2nd Revised Sheet No. 29
3rd Revised Sheet No. 31, Canceling 2nd Revised Sheet No. 31
3rd Revised Sheet No. 35, Canceling 2nd Revised Sheet No. 35
3rd Revised Sheet No. 41, Canceling 2nd Revised Sheet No. 41
3rd Revised Sheet No. 42, Canceling 2nd Revised Sheet No. 42
3rd Revised Sheet No. 43, Canceling 2nd Revised Sheet No. 43
3rd Revised Sheet No. 44, Canceling 2nd Revised Sheet No. 44
3rd Revised Sheet No. 47, Canceling 2nd Revised Sheet No. 47
3rd Revised Sheet No. 48, Canceling 2nd Revised Sheet No. 48
3rd Revised Sheet No. 50, Canceling 2nd Revised Sheet No. 50
3rd Revised Sheet No. 51, Canceling 2nd Revised Sheet No. 51
3rd Revised Sheet No. 52, Canceling 2nd Revised Sheet No. 52
3rd Revised Sheet No. 53, Canceling 2nd Revised Sheet No. 53
3rd Revised Sheet No. 54, Canceling 2nd Revised Sheet No. 54
3rd Revised Sheet No. 56, Canceling 2nd Revised Sheet No. 56
3rd Revised Sheet No. 57, Canceling 2nd Revised Sheet No. 57
3rd Revised Sheet No. 59, Canceling 2nd Revised Sheet No. 59
3rd Revised Sheet No. 60, Canceling 2nd Revised Sheet No. 60
3rd Revised Sheet No. 61, Canceling 2nd Revised Sheet No. 61
3rd Revised Sheet No. 66, Canceling 2nd Revised Sheet No. 66
3rd Revised Sheet No. 67, Canceling 2nd Revised Sheet No. 67
3rd Revised Sheet No. 68, Canceling 2nd Revised Sheet No. 68
3rd Revised Sheet No. 70, Canceling 2nd Revised Sheet No. 70
3rd Revised Sheet No. 71, Canceling 2nd Revised Sheet No. 71
3rd Revised Sheet No. 74, Canceling 2nd Revised Sheet No. 74
3rd Revised Sheet No. 76, Canceling 2nd Revised Sheet No. 76

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3rd Revised Sheet No. 79, Canceling 2nd Revised Sheet No. 79
3rd Revised Sheet No. 80, Canceling 2nd Revised Sheet No. 80
4th Revised Sheet No. 88, Canceling 3rd Revised Sheet No. 88
4th Revised Sheet No. 89, Canceling 3rd Revised Sheet No. 89
3rd Revised Sheet No. 90, Canceling 2nd Revised Sheet No. 90
4th Revised Sheet No. 91, Canceling 3rd Revised Sheet No. 91
4th Revised Sheet No. 92, Canceling 3rd Revised Sheet No. 92
2nd Revised Sheet No. 93, Canceling 1st Revised Sheet No. 93
3rd Revised Sheet No. 95, Canceling 2nd Revised Sheet No. 95
3rd Revised Sheet No. 97, Canceling 2nd Revised Sheet No. 97
3rd Revised Sheet No. 99, Canceling 2nd Revised Sheet No. 99
3rd Revised Sheet No. 100, Canceling 2nd Revised Sheet No. 100
3rd Revised Sheet No. 103, Canceling 2nd Revised Sheet No. 103
3rd Revised Sheet No. 104, Canceling 2nd Revised Sheet No. 104
1st Revised Sheet No. 124, Canceling Original Sheet No. 124
1st Revised Sheet No. 125, Canceling Original Sheet No. 125
1st Revised Sheet No. 126, Canceling Original Sheet No. 126
Original Sheet No. 128
Original Sheet No. 129
Original Sheet No. 130
Original Sheet No. 131
Original Sheet No. 132
Original Sheet No. 133
Original Sheet No. 134
Original Sheet No. 135
4th Revised Sheet No. R-2, Canceling 3rd Revised Sheet No. R-2
2nd Revised Sheet No. R-4, Canceling 1st Revised Sheet No. R-4
2nd Revised Sheet No. R-5, Canceling 1st Revised Sheet No. R-5
1st Revised Sheet No. R-21, Canceling Original Sheet No. R-21
2nd Revised Sheet No. R-45, Canceling 1st Revised Sheet No. R-45
1st Revised Sheet No. R-66, Original Sheet No. R-66

5. KCP&L Greater Missouri Operations Company is authorized to file tariffs in compliance with the terms of the Non-Unanimous Stipulation and Agreement.

6. Tariffs filed in accordance with Ordered Paragraph No. 5 shall be filed with an effective date of September 1, 2009.

7. The Non-Unanimous Stipulation and Agreement Regarding Pensions filed on May 22, 2009, is hereby approved as the resolution of all factual issues encompassed within that agreement in case number ER-2009-0090. A copy of the Non-Unanimous Stipulation

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and Agreement Regarding Pensions is attached to this order as Appendix B.

8. The Signatories to the Non-Unanimous Stipulation and Agreement Regarding Pensions are ordered to comply with the terms of the Agreement.

9. The prefiled testimony, including all attachments thereto, of the Signatory witnesses to the Non-Unanimous Stipulation and Agreement are received and into the case file pursuant to the Signatories' agreement. A copy of the exhibits list is attached to this order as Appendix C.

10. The remainder of the procedural schedule adopted by the Commission on November 20, 2008, and subsequently modified on March 18, 2009, including the evidentiary hearing is canceled.

11. This order shall become effective on June 23, 2009.

Clayton, Chm., Davis and Jarrett, CC.,
concur, with separate concurring opinions
to follow;
Gunn, C., concurs.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: At time of publication, no opinion of Commissioner Davis has been filed.

CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III

This Commissioner concurs with the majority's Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case Nos. ER-2009-0089 and ER-2009-0090, as well as its Order Approving Unanimous Stipulation and Agreement in Case No. HR-2009-0092, all three of which are rate cases filed by Great Plains Energy. The cases include the general rate proceeding for the Kansas City Power & Light service territory, the areas formerly served by Aquila Networks for electric service in both St. Joseph Light and Power (L&P) and Missouri Public Service (MPS) areas and the area formerly served by Aquila Networks for steam or heating service. The global settlements reached in these cases resulted from extensive negotiations among nearly all stakeholders in an agreement that includes incorporation into rates of significant investments in new environmental upgrades to

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facilities at plants known as latan 1, Jeffrey Energy Center, and Sibley Generating Facility. The settlements also acknowledge the unfortunate need to significantly raise electric and steam rates relative to those investments that will have a direct impact on customer budgets. Although the electric rates do not take effect until September 1, 2009, the Commission is mindful that given the state of the economy customers will consider this a terrible time to raise utility rates, even if this increase was planned for and expected.

The Commission has little choice but to approve the agreements, which are supported by the Public Counsel, the PSC Staff, several government agencies, other diverse stakeholders and it is not opposed by numerous industrial customers. Even though the agreements result in rate increases, the process has culminated in a global settlement with participation and endorsement of the rate payer advocates as well as the utility, suggesting reasonableness of the result. These rate increases are not simply raising the return or profit margin allowed to the company but instead represent significant investments in plant that will benefit the public and the environment through reductions in emissions. Environmental mandates have required the investment in infrastructure that will improve the air quality in the vicinity of these facilities.

These rate increases were also contemplated in, and planned for in, KCPL's Experimental Regulatory Plan, which was the product of year-long, extensive, good faith negotiations and represent the consensus of a large, diverse group of interests in Case No. EO-2005-0329. The parties each had access to highly qualified subject matter experts, including accountants, economists and engineers, and filed extensive testimony outlining their respective analyses and positions prior to the signatories reaching a consensus as to the reasonableness of the Agreements and all of their elements.

This rate increase reflects an across the board increase of 16.1% in the KCPL service territory, a 10.46% increase in the Missouri Public Service service territory, an 11.85% increase in the St. Joe Light and Power service territory. These are significant rate increases that will certainly have an impact on customers in their respective territories, and the impact on those customers is not to be taken lightly.

Rate payers should be aware that these increases are not the last in the foreseeable future considering that in 2010, it is planned that nearly the entire investment in latan 2 will be placed into rate base causing another potential rate increase. Large investments in plant which are necessary for the provision of service result in significant rate

increases. Rate payers should take solace that the PSC Staff and Public Counsel's review of the expenditures, in the planning process for new environmental upgrades and new generation, have found these costs to be prudent and reasonable and that the Commission found them to be necessary for the public interest. The Commission must and will take additional steps at helping customers take control of their utility bills through aggressive energy efficiency programs, empower customers with information to make wise energy choices and embrace new technologies such as customer owned generation and smart grid improvements in a rapidly changing energy environment. We must also take steps at improving programs for low-income customers who remain vulnerable to disconnection. Lastly, with additional future increases on the horizon, from additions of new generation and climate change legislation, we must be prepared at retaining and attracting industry that depend on Missouri low cost power.

For the foregoing reasons, this Commissioner concurs.

**CONCURRING OPINION OF
COMMISSIONER TERRY M. JARRETT**

I applaud the parties for negotiating proposed settlements in these cases and saving the time and expense of holding weeks of evidentiary hearings. I also fully support the results reached in the Orders issued by the Commission in these cases. However, I write separately to raise my serious concern regarding the overall structure and content of the Commission Orders themselves.

The Commission's statutory duties are not diminished or mitigated simply because the parties have proposed stipulations and agreements. This includes not only preparing and issuing Orders that are legally sufficient, but also ensuring that the Commission not merely accept settlements for settlements sake. *In the Matter of WPC Sewer Company's Small Company Rate Increase*, File No. SR-2008-0388, I stated the following, which bears repeating here:

“ [...] the United States Supreme Court made clear that the controlling test in determining “just and reasonable” rates is the end result¹ and not the method of

¹ This case established the doctrine of the “end result.” *The Regulation of Public Utilities, Theory and Practice*, 3rd Ed. Charles F. Phillips, Jr., pg. 181, 1993.

reaching that result. [...] As regulators, we must not lose sight of our ultimate responsibility, which is determining just and reasonable rates that are in the public interest, while also ensuring safe and reliable service. **Only the Commissioners make that final determination, which is why a unanimous stipulation presented to the Commission is nothing more than a “proposed resolution.”²** A stipulation is only a suggestion as to the disposition of some or all of the issues pertaining to the utility’s revenue increase request that the Commission considers in determining whether the result is just and reasonable rates.

(Emphasis in the original and added.). The parties to a case have no authority to determine or conclude that just and reasonable rates are achieved through settlement, or that the settlement ensures safe and adequate service. This determination is the Commission’s to make and it is the Commission’s *choice* as to whether to accept or reject a proposed stipulation and agreement. The Commission has rejected numerous stipulated settlements in the past, and no party, utility, consumer, ratepayer, shareholder or any person with any interest in the outcome of the matters before this regulatory body should ever conclude that this Commission is left with *little or no choice* in the matters that come before it.³ The viewpoint that because a case is settled - or that a

² 4 CSR 240-3.050(10) (*emphasis added*).

³ *The Staff of the Missouri Public Service Comm’n v. Lockheed Martin Global Telecommunications Services*, Case No. TC-2004-0415, and, *In the Matter of Lockheed Martin Global Telecommunications Services, Inc.’s 2002 Annual Report to the Commission as an Interexchange Telecommunications Carrier*, Case No. XE-2004-0488, 2004 WL 2016229 (Mo. P.S.C. 2004), Order Rejecting Stipulation and Agreement, issued September 12, 2004 (similar cases pending in the circuit court require rejection); *In re Missouri RSA No. 5 Partnership, dba Chariton Valley Wireless*, Case No. TK-2005-0304, 2005 WL 1719375 (Mo. P.S.C. 2005), Amended Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In re Chariton Valley Communications Corporation, Inc.*, Case No. TK-2005-0300, 2005 WL 1719378 (Mo. P.S.C. 2005), Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In the Matter of the Agreement between*

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case has a low appeal probability - diminishes or even relieves the Commission of its duty, is misguided and contrary to current law.

I believe that these Orders do not comply with legal requirements regarding “findings of fact” and as such, the Orders should be withdrawn by the Commission and rewritten to fully comply with the law. The Commission is bound by its statutory obligations, and controlling opinions of the appellate courts. This means that the Commission must ensure that its Orders are not merely recitations of conclusions drawn by the parties, but instead are based on facts which the Commission independently and impartially has found supportive of its conclusions. Orders must provide sufficient analysis so that they provide the Commission’s reasoning not only to those that the Commission regulates, but also to reviewing courts, parties, the public, and even individuals that might have a reason to study or review Commission orders.

The recent tendency of this Commission to editorially streamline the Orders it issues in cases where the parties have reached either a unanimous or non-unanimous settlement proposal is unfortunate. This is a trap into which the Commission has fallen before, and I am compelled to reiterate what the appellate courts of this state have repeatedly made clear to the Commission - that is that in all written Commission “reports”, inclusion of findings of fact are required. *State ex rel. Rice v. Public Service Comm’n et al.*, 220 S.W.2d 61, 65 (1949). In *State ex rel. Monsanto Company v. Public Service Comm’n, et al.*, 716 S.W.2d 791

SBC Communications, Inc. and Sage Telecom, Inc., Case No. TO-2004-0576, and, *In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584, 2004 WL 1824101 (Mo. P.S.C. 2005), Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention, issued July 27, 2004 (the Commission, complying with its statutory mandate under the Telecommunications Act, is unable to determine if the negotiated agreement is discriminatory and must reject it as not being in the public interest); *Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc.*, Case No. MC-2004-0271, 2004 WL 1813292 (Mo. P.S.C. 2004), Order Rejecting Stipulated Agreement and Setting Prehearing Conference, issued July 8, 2004 (negotiated agreement is not structured in a manner consistent with the public interest); *In re St. Joseph Light and Power Company*, Case No. ER-93-41 and, Case No. EC-93-252, 1993 WL 449447 (Mo. P.S.C. 1993), Report and Order, issued June 25, 1993, (Commission rejected proposed settlement agreement between its Staff and SJLPC on the issue of rate design finding it to be inconsistent with prior Commission Order in Case No. EO-88-158).

(Mo. Banc 1986) the Commission staff conceded that this requirement is embodied in Section 386.420(2) RSMo (2000) (formerly, § 5688 RSMo 1939). Any contention that written findings of fact in Commission Orders are unnecessary is not consistent with statute and flies in the face of the directives of this state's appellate courts.

Even though Section 536.090 RSMo states that every decision and Order in a contested case shall include or be accompanied by findings of fact and conclusions of law which shall be stated separately "except in default cases or cases disposed of by stipulation, consent order or agreed settlement", this *does not* eliminate the obligation of the Commission to make findings, and further, describe those findings in its Orders. This point was announced in *Rice*, and later upheld by *Fischer v. Public Service Comm'n*, 645 S.W. 39 (Mo. App. W.D. 1982). *Fischer*, as a case which was settled by stipulation and agreement, controls this Commission regarding the application of 536.090 RSMo, and the requirements for the Orders in these cases. *Fischer* held that the inclusion of findings of fact in Commission Orders is not a matter of style but is a *legal requirement*. *Id.* at 44. Missouri Courts interpreting Section 386.420 have held that in contested cases (i.e. proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing), the Commission must include findings of fact in its written reports.⁴ Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. In these cases, this has not occurred.⁵

An Order can be insufficient as to findings of fact in at least two ways: (1) clear omission of findings of fact, and (2) the failure of purported findings of fact to actually constitute "findings of fact." In *State of Missouri, ex. rel. Noranda Aluminum, Inc. v. Public Service Comm'n*, 24 S.W.3d 243, 245 (Mo. App. W.D. 2000), a Commission Order that

⁴ Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-796 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article V, Section 18, however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffman v. Public Serv. Comm'n*, 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm'n*, 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

⁵ *Id.*

purported to contain “extensive findings of fact”, “including more than 27 pages”, was found to be nothing more than “a general discussion of the parties’ positions and a brief explanation of which position the commission deemed correct.” The *Noranda* Court was especially harsh on the Commission’s failure to follow the Court’s prior directives:

The Commission apparently ignored our admonition to one [sic] its sister administrative agencies: [M]erely reciting the testimony ... does not establish which of the facts set forth in the [recitation] the [agency] found to be true. [An agency] must make unequivocal, affirmative findings of the facts. *Parrot v. HQ, Inc.*, 907 S.W.2d 236, 244 (Mo. App. 1995). *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655, 661 (Mo. App. 1997). [Mere recitation of testimony] is of no help to us in determining what facts the [agency] found. It provides nothing for a meaningful judicial review. Nor did the Commission seem to note our earlier admonition that, “[w]ithout specific findings of fact ..., it is impossible to determine whether the action of the [agency] was supported by substantial evidence.” *Webb v. Board of Police Commissioners of Kansas City*, 694 S.W. 2d 927, 929 (Mo. App. 1985)

State of Missouri, ex rel. v. Noranda Aluminum, Inc., 24 S.W.3d 243, 246 (Mo. App. W.D. 2000). Unfortunately, this Commission continues to ignore the clear directives of the Court of Appeals. It appears to me that the Commission’s Orders in these cases rely solely on *legal conclusions* propounded by parties as a way to bootstrap the conclusions reached in the Orders. Accordingly, the Orders include no written factual basis for support.

Neither the Staff of the Commission, or any party appearing before the Commission, possess the statutory authority to make *legal* conclusions regarding “just and reasonable rates”. That authority was

granted by the legislature to the Commission, and the Commission alone.⁶ It is well settled that parties may not stipulate to conclusions of law.⁷ As in *Noranda*, the absence of “nonconclusory facts” to support the Order was found unacceptable, which is why here in these cases, the Commission should, upon its own motion, withdraw these Orders and have them rewritten to conform to the appropriate legal standard. New Orders must therefore state which facts on which the Commission has based its decisions to approve the agreements, lest this Commission be left to future admonishments by the appellate courts.

In addition to believing that the Commission should, upon its own motion, withdraw the Orders for revision to include findings of fact, I also believe that the Commission should initiate a rulemaking to amend 4 CSR 240-2.115 to: (1) provide clear guidance that findings of fact shall be included in Commission Orders in cases of stipulations and agreements; and (2) require parties to file proposed findings of facts and conclusions of law with any proposed stipulation and agreement they submit to the Commission for approval.

The Commission should not streamline its Orders at the expense of legal sufficiency, but should instead strive to ensure that every Order will pass legal muster specifically as to whether the findings of fact and conclusions of law are sufficient.⁸ Because deciding whether rates are just and reasonable is a *conclusion of law*, the Commission must independently and impartially review the facts of any case, including these cases where a proposed stipulation and agreement has been submitted for consideration. Here, I do not believe that the written Orders in these cases adequately detail that the Commission made such an independent and impartial review. I am by no means implying that such an independent and impartial review did not take place; in fact, this Commissioner did perform an independent and impartial review of the facts in these cases. Based upon my review of the proposed agreements, relevant testimony in the record, and arguments presented

⁶ Section 393.130 RSMo.

⁷ Litigants cannot stipulate as to questions of law. *State v. Biddler*, 599 S.W.2d 182, 186 and n.4 (Mo. Banc 1980). Further, the Commission must independently and impartially review the facts of any case. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. E.D. 1988).

⁸ *Deaconess Manor Ass'n v. Public Service Comm'n of State of Mo.*, 994 S.W. 2d 602 (Mo. App. W.D. 1999).

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at the June 8, 2009, stipulation hearing, I have made an independent conclusion that the agreements proposed, and in all respects provide, just and reasonable rates that are in the public interest, while ensuring safe and adequate service.

Therefore, despite my concerns about the form of the Orders, I concur.

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Steam Heating Service

Case No. HR-2009-0092

Decided June 10, 2009

Steam §20. The Commission approved a stipulation and agreement that resolved KCP&L Greater Missouri Operations Company's request for a general rate increase.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT
AND AUTHORIZING TARIFF FILING**

Syllabus

This order approves the Unanimous Stipulation and Agreement executed by KCP&L Greater Missouri Operations Company ("GMO"), the Staff of the Missouri Public Service Commission ("Staff"), the Office of the Public Counsel ("Public Counsel"), and Ag Processing, Inc. ("Ag Processing") to resolve all issues in this case ("Agreement"). The order also rejects GMO's initial tariff filing and authorizes GMO to file tariffs in compliance with the Agreement.

I. Procedural History

On September 5, 2008, GMO submitted to the Commission proposed tariff sheets intended to implement a general rate increase for steam heating service provided in its Missouri service area. The proposed tariff sheets were assigned tariff file number YH-2009-0195 and bear an effective date of August 5, 2009. According to GMO's application, the tariff sheets were designed to produce an annual increase of \$1.3 million in GMO's Missouri jurisdictional revenues.

On September 12, 2008, the Commission issued notice and set a deadline for intervention requests. The Commission granted the request for intervention of Ag Processing.

On November 20, 2008, the Commission set the procedural

schedule. This schedule included an evidentiary hearing scheduled for May 4-7, 2009, and a True-Up hearing scheduled for June 1-2, 2009. On March 18, 2009, the Commission granted a request of GMO to extend all of the True-Up proceedings and the True-Up hearing was reset for July 1-2, 2009.¹

The Commission held local public hearings in Lee's Summit, Sedalia, St. Joseph, Marshall, Carrollton, Nevada, and two separate hearings in Kansas City, Missouri.² The Commission utilized the same locations and times to conduct combined local public hearings for ER-2009-0089, ER-2009-0090, and HR-2009-0092.

The evidentiary hearing commenced on May 4, 2009. Once preliminary matters were complete, the parties requested a recess to engage in settlement negotiations. Following completion of the negotiations, the parties indicated that they had reached an agreement in principle and announced their intention to memorialize a Unanimous Stipulation and Agreement and file it with the Commission. Consequently, the Commission suspended the remainder of the evidentiary hearing to allow for the filing of the Agreements and for responses or objections.³

On May 13, 2009, GMO filed the Agreements. Deadlines were set for responses, suggestions supporting the agreements and replies to the suggestions.⁴ No one objected to the Agreement and no party requested that the evidentiary hearing be resumed to hear any issue.

On June 8, 2009, the Commission convened a hearing for the formal presentation of the Agreement and to direct questions about the Agreement to the parties' counsel and subject matter experts.⁵ The Commission did not order briefs and closed the recording of all evidence at the conclusion of the stipulation hearing on June 8, 2009.

II. The Agreement

¹ Order Modifying Procedural Schedules For True-Up Proceedings and Formally Adopting Test Year And Update Period, issued March 18, 2009. See also, Order Rescinding Conditions Imposed in the Commission's Order Modifying Procedural Schedules for True-Up Proceedings, issued April 15, 2009.

² Order Setting Public Comment Hearings, issued January 6, 2009; Order Rescheduling Public Comment Hearings, issued January 16, 2009; Notice Regarding Requests for Additional Local Public Hearings, filed February 25, 2009; Order Expanding Access To Public Comment Hearings, issued February 25, 2009.

³ Transcript, Volume 11.

⁴ Notice and Order Suspending Evidentiary Hearing, Setting Deadlines for Filings, and Setting Deadline For Requesting A Hearing, issued May 4, 2009.

⁵ Transcript, Volume 12.

The Agreement purports to resolve all issues in this matter.⁶ Among other provisions, the Agreement provides that GMO should be authorized to file revised tariff sheets containing new rate schedules for steam heating service designed to produce overall Missouri jurisdictional gross annual steam heating revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, in the amount of \$384,000. The Agreement provides that these revenues shall be for steam heating service rendered on and after July 1, 2009, without the necessity for GMO to file any other motion or pleading. The parties further agreed that the exemplar tariffs filed with the Agreement implement the terms of the agreement and resolve all revenue requirement and all rate design issues in this case.⁷

The Agreement also establishes certain modifications to the Fuel Cost Customer/Utility Alignment Mechanism that was originally approved by the Commission in Case No. HR-2005-0450.⁸ In addition, GMO agrees that it will not seek to *implement* another rate increase in base rates for steam service sooner than 14 months following the effective date of the tariffs approved in this proceeding.⁹

Finally, the Agreement includes a contingent waiver of rights indicating that if the Commission approves in whole the Agreement, the signatories agreed to waive their rights to call and cross-examine witnesses,¹⁰ to present oral argument and written briefs,¹¹ and to judicial review.¹²

By submitting the Agreement for consideration by the Commission, the parties jointly recommend that the Commission accept the Agreement as a fair compromise of their respective positions on the issues in this matter.¹³ The parties negotiated the various terms of these provisions and no party has objected or sought a hearing with respect to any of these provisions. There are no disputed issues between the parties with regard to the provisions of the Agreement.

III. Relevant Legal Standards

A. Jurisdiction

⁶ *Unanimous Stipulation and Agreement*, filed on May 13, 2009. The Agreement is attached to this order as Appendix A.

⁷ Agreement, para. 3.

⁸ Agreement, para. 2.

⁹ Agreement, para. 4.

¹⁰ Section 536.070(2).

¹¹ Section 536.080.1.

¹² Section 386.510.

¹³ *Id.*

GMO is a “heating company” and a “public utility,” as defined in Sections 386.020(20) and (43), respectively, and is subject to the personal jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. GMO filed its application pursuant to Commission Rules 4 CSR 240-2.060, 3.030, and 3.425. These rules outline the minimum filing requirements for GMO to pursue its rate increase request.

B. Standards for Approving Stipulations and Agreements

The Commission has the legal authority to accept a Stipulation and Agreement as offered by the parties as a resolution of the issues raised in this case.¹⁴

In reviewing the Agreement, the Commission notes:

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.¹⁵

Should the Commission find that the terms of the Agreement are lawful and just and reasonable, the Commission may approve the Agreement as a resolution of all factual issues in this matter.

C. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.¹⁶ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.¹⁷

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.¹⁸ “In all

¹⁴Section 536.060, RSMo; and 4 CSR 240-2.115(1)(B).

¹⁵Section 536.090, RSMo. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App. 1998).

¹⁶*In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

¹⁷*State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

¹⁸*State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142

events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”¹⁹

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, consistent with the Commission’s statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Discussion

This case illustrates one of the most important public policy questions faced by this Commission: What is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers and ensuring that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have an opportunity to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure?²⁰

The Commission recognizes that the recommended revenue requirement presented in the Agreement is not a trivial amount of money to customers. The increased cost of all utilities along with the recent rise in other costs have had an effect on customers’ ability to keep current on their bills. That being said, the Commission also recognizes that the Agreement before the Commission resulted from extensive negotiations between parties with diverse interests and the Commission’s neutral Staff.

Subject matter experts, including accountants, economists and engineers, filed extensive testimony outlining their respective analyses and positions prior to the parties reaching a consensus as to the reasonableness of the Agreement and all of its elements. The parties agree to the conclusion that the proposed revenue and rate design set out in the Agreement are just and reasonable.

S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm’n*, 835 S.W.2d 356, 371 (Mo. App. 1992).

¹⁹ *State ex rel. Gulf Transport Co. v. Public Serv. Comm’n*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S. Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Serv. Comm’n*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Serv. Comm’n*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); Sections 386.490 and 386.510.

²⁰ See generally, Section 386.610, RSMo 2000.

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The Commission further notes that no party has objected to the proposed annual revenue requirement, or to any component of any calculations, allocations, negotiations or compromise resulting in the proposed annual revenue requirement as set forth in the Agreement. No party has objected to the use of any determinants utilized for the purpose of determining rate design in the Agreement. And finally, no party requested a hearing on any issue related to the determination of the proposed annual revenue requirement, rate design, or any other provision set forth in the Agreement.

GMO has compromised on its requested revenue requirement by entering into the Agreement and recommending to the Commission that its authorized revenue requirement in this case represents an increase in revenues associated with its steam heating service of \$384,000. All the parties agree to this revenue requirement.

The Reconciliation filed in this case reveals that the parties initially had differing positions on rate base, revenue, expenses, depreciation, and taxes, as well as the many components and allocations that determine these factors. Indeed, as the Commission has recognized many times, the complexity of the issues and the number of parties often involved in rate cases can be staggering. Parties regularly engage in settlement negotiations, sometimes, as in this case, resolving their disputes with "black box" settlements. That is to say, the many parties arrive at, for example, a final revenue requirement number that they all find acceptable. But that settlement does not reveal how the parties arrived at that number, who moved how many dollars on what issue, etc.

Regardless, the Commission determines that the proposed increase in overall Missouri gross annual steam heating revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes, or similar fees or taxes, of \$384,000, effective for steam heating services rendered on and after July 1, 2009, is just and reasonable.

This revenue requirement is no more than is sufficient to keep GMO's utility plants in proper repair for effective public service, and insure to GMO's investors a reasonable return upon funds invested. The Commission further concludes that none of the adjunct provisions to the Agreement are contrary to any statute or rule, or in any way violate the public interest. The Commission shall approve all of the provisions encompassed the Agreement.

Furthermore, because the exemplar tariffs have been on file at the Commission since May 13, 2009, and all parties agree to those tariffs

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becoming effective on July 1, 2009, the Commission finds that good cause exists to approve revised tariffs without the need for those tariffs having been filed for an additional 30 days.

V. Decision

By submitting the Agreement for consideration by the Commission, the parties jointly recommend that the Commission accept the Agreement as a fair compromise of their respective positions on the issues in this matter. Based on the Agreement and the testimony, comments, and positions presented at the stipulation hearing, the Commission finds that the parties have reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service. Accordingly, the Commission shall authorize GMO to file tariffs in compliance with the Agreement. The parties shall be directed to comply with the terms of the Agreement.

The Commission shall, as agreed to by the parties, admit, without modification or condition, the prefiled testimony (including all exhibits, appendices, schedules, etc. attached thereto) of all the witnesses.

THE COMMISSION ORDERS THAT:

1. The Unanimous Stipulation and Agreement filed on May 13, 2009, is hereby approved as the resolution of all factual issues encompassed within that Agreement in case number HR-2009-0092. A copy of the Unanimous Stipulation and Agreement is attached to this order as Appendix A.

2. The signatories to the Unanimous Stipulation and Agreement are ordered to comply with the terms of the Agreement.

3. The proposed steam heating service tariff sheets (YH-2009-0195) submitted on September 5, 2008, by KCP&L Greater Missouri Operations Company for the purpose of increasing rates for steam heating service to retail customers are hereby rejected.

4. The specific tariff sheets rejected are:

P.S.C. MO. No. 1

2nd Revised Sheet No. 1, Canceling 1st Revised Sheet No. 1

2nd Revised Sheet No. 2, Canceling 1st Revised Sheet No. 2

2nd Revised Sheet No. 3, Canceling 1st Revised Sheet No. 3

2nd Revised Sheet No. 4, Canceling 1st Revised Sheet No. 4

2nd Revised Sheet No. 5, Canceling 1st Revised Sheet No. 5

1st Revised Sheet No. 6.1, Canceling Original Sheet No. 6.1

Original Sheet No. 6.6

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Original Sheet No. 6.7

Original Sheet No. 6.8

Original Sheet No. 6.9

5. KCP&L Greater Missouri Operations Company is authorized to file tariffs in compliance with the terms of the Unanimous Stipulation and Agreement.

6. Tariffs filed in accordance with Ordered Paragraph No. 5 shall be filed with an effective date of July 1, 2009.

7. The prefiled testimony of the witnesses, including all attachments thereto, are received into the case file pursuant to the Unanimous Stipulation and Agreement. A copy of the exhibits list is attached to this order as Appendix B.

8. The remainder of the procedural schedule adopted by the Commission on November 20, 2008, and subsequently modified on March 18, 2009, including the evidentiary hearing is canceled.

9. This order shall become effective on June 23, 2009.

Clayton, Chm., Davis and Jarrett, CC.,
concur, with separate concurring opinions
to follow;
Gunn, C., concurs.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: At time of publication, no opinions from Commissioner Davis have been filed.

CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III

This Commissioner concurs with the majority's Order Approving Non-Unanimous Stipulations And Agreements And Authorizing Tariff Filing in Case Nos. ER-2009-0089 and ER-2009-0090, as well as its Order Approving Unanimous Stipulation and Agreement in Case No. HR-2009-0092, all three of which are rate cases filed by Great Plains Energy. The cases include the general rate proceeding for the Kansas City Power & Light service territory, the areas formerly served by Aquila Networks for electric service in both St. Joseph Light and Power (L&P) and Missouri Public Service (MPS) areas and the area formerly served by Aquila Networks for steam or heating service. The global settlements

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reached in these cases resulted from extensive negotiations among nearly all stakeholders in an agreement that includes incorporation into rates of significant investments in new environmental upgrades to facilities at plants known as Iatan 1, Jeffrey Energy Center, and Sibley Generating Facility. The settlements also acknowledge the unfortunate need to significantly raise electric and steam rates relative to those investments that will have a direct impact on customer budgets. Although the electric rates do not take effect until September 1, 2009, the Commission is mindful that given the state of the economy customers will consider this a terrible time to raise utility rates, even if this increase was planned for and expected.

The Commission has little choice but to approve the agreements, which are supported by the Public Counsel, the PSC Staff, several government agencies, other diverse stakeholders and it is not opposed by numerous industrial customers. Even though the agreements result in rate increases, the process has culminated in a global settlement with participation and endorsement of the rate payer advocates as well as the utility, suggesting reasonableness of the result. These rate increases are not simply raising the return or profit margin allowed to the company but instead represent significant investments in plant that will benefit the public and the environment through reductions in emissions. Environmental mandates have required the investment in infrastructure that will improve the air quality in the vicinity of these facilities.

These rate increases were also contemplated in, and planned for in, KCPL's Experimental Regulatory Plan, which was the product of year-long, extensive, good faith negotiations and represent the consensus of a large, diverse group of interests in Case No. EO-2005-0329. The parties each had access to highly qualified subject matter experts, including accountants, economists and engineers, and filed extensive testimony outlining their respective analyses and positions prior to the signatories reaching a consensus as to the reasonableness of the Agreements and all of their elements.

This rate increase reflects an across the board increase of 16.1% in the KCPL service territory, a 10.46% increase in the Missouri Public Service service territory, an 11.85% increase in the St. Joe Light and Power service territory. These are significant rate increases that will certainly have an impact on customers in their respective territories, and the impact on those customers is not to be taken lightly.

Rate payers should be aware that these increases are not the last in the foreseeable future considering that in 2010, it is planned that

nearly the entire investment in latan 2 will be placed into rate base causing another potential rate increase. Large investments in plant which are necessary for the provision of service result in significant rate increases. Rate payers should take solace that the PSC Staff and Public Counsel's review of the expenditures, in the planning process for new environmental upgrades and new generation, have found these costs to be prudent and reasonable and that the Commission found them to be necessary for the public interest. The Commission must and will take additional steps at helping customers take control of their utility bills through aggressive energy efficiency programs, empower customers with information to make wise energy choices and embrace new technologies such as customer owned generation and smart grid improvements in a rapidly changing energy environment. We must also take steps at improving programs for low-income customers who remain vulnerable to disconnection. Lastly, with additional future increases on the horizon, from additions of new generation and climate change legislation, we must be prepared at retaining and attracting industry that depend on Missouri low cost power.

For the foregoing reasons, this Commissioner concurs.

**CONCURRING OPINION OF
COMMISSIONER TERRY M. JARRETT**

I applaud the parties for negotiating proposed settlements in these cases and saving the time and expense of holding weeks of evidentiary hearings. I also fully support the results reached in the Orders issued by the Commission in these cases. However, I write separately to raise my serious concern regarding the overall structure and content of the Commission Orders themselves.

The Commission's statutory duties are not diminished or mitigated simply because the parties have proposed stipulations and agreements. This includes not only preparing and issuing Orders that are legally sufficient, but also ensuring that the Commission not merely accept settlements for settlements sake. *In the Matter of WPC Sewer Company's Small Company Rate Increase*, File No. SR-2008-0388, I stated the following, which bears repeating here:

“ [...] the United States Supreme Court made clear that the controlling test in determining “just and reasonable” rates

is the end result¹ and not the method of reaching that result. [...] As regulators, we must not lose sight of our ultimate responsibility, which is determining just and reasonable rates that are in the public interest, while also ensuring safe and reliable service. **Only the Commissioners make that final determination, which is why a unanimous stipulation presented to the Commission is nothing more than a “proposed resolution.”**² A stipulation is only a suggestion as to the disposition of some or all of the issues pertaining to the utility’s revenue increase request that the Commission considers in determining whether the result is just and reasonable rates.

(Emphasis in the original and added.). The parties to a case have no authority to determine or conclude that just and reasonable rates are achieved through settlement, or that the settlement ensures safe and adequate service. This determination is the Commission’s to make and it is the Commission’s *choice* as to whether to accept or reject a proposed stipulation and agreement. The Commission has rejected numerous stipulated settlements in the past, and no party, utility, consumer, ratepayer, shareholder or any person with any interest in the outcome of the matters before this regulatory body should ever conclude that this Commission is left with *little or no choice* in the matters that come before it.³ The viewpoint that because a case is settled - or that a

¹ This case established the doctrine of the “end result.” The Regulation of Public Utilities, Theory and Practice, 3rd Ed. Charles F. Phillips, Jr., pg. 181, 1993.

² 4 CSR 240-3.050(10) (*emphasis added*).

³ *The Staff of the Missouri Public Service Comm’n v. Lockheed Martin Global Telecommunications Services*, Case No. TC-2004-0415, and, *In the Matter of Lockheed Martin Global Telecommunications Services, Inc.’s 2002 Annual Report to the Commission as an Interexchange Telecommunications Carrier*, Case No. XE-2004-0488, 2004 WL 2016229 (Mo. P.S.C. 2004), Order Rejecting Stipulation and Agreement, issued September 12, 2004 (similar cases pending in the circuit court require rejection); *In re Missouri RSA No. 5 Partnership, dba Chariton Valley Wireless*, Case No. TK-2005-0304, 2005 WL 1719375 (Mo. P.S.C. 2005), Amended Order Rejecting Interconnection Agreement, issued

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case has a low appeal probability - diminishes or even relieves the Commission of its duty, is misguided and contrary to current law.

I believe that these Orders do not comply with legal requirements regarding “findings of fact” and as such, the Orders should be withdrawn by the Commission and rewritten to fully comply with the law. The Commission is bound by its statutory obligations, and controlling opinions of the appellate courts. This means that the Commission must ensure that its Orders are not merely recitations of conclusions drawn by the parties, but instead are based on facts which the Commission independently and impartially has found supportive of its conclusions. Orders must provide sufficient analysis so that they provide the Commission’s reasoning not only to those that the Commission regulates, but also to reviewing courts, parties, the public, and even individuals that might have a reason to study or review Commission orders.

The recent tendency of this Commission to editorially streamline the Orders it issues in cases where the parties have reached either a unanimous or non-unanimous settlement proposal is unfortunate. This is a trap into which the Commission has fallen before, and I am compelled to reiterate what the appellate courts of this state have repeatedly made clear to the Commission - that is that in all written Commission “reports”,

May 19, 2005 (negotiated agreement not in the public interest); *In re Chariton Valley Communications Corporation, Inc.*, Case No. TK-2005-0300, 2005 WL 1719378 (Mo. P.S.C. 2005), Order Rejecting Interconnection Agreement, issued May 19, 2005 (negotiated agreement not in the public interest); *In the Matter of the Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. TO-2004-0576, and, *In the Matter of an Amendment Superseding Certain 251/252 Matters between Southwestern Bell Telephone, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584, 2004 WL 1824101 (Mo. P.S.C. 2005), Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention, issued July 27, 2004 (the Commission, complying with its statutory mandate under the Telecommunications Act, is unable to determine if the negotiated agreement is discriminatory and must reject it as not being in the public interest); *Manager of the Manufactured Housing and Modular Units Program of the Public Service Commission, v. Coachman Homes of Eureka, Inc., d/b/a Coachman Homes of Eureka, Inc.*, Case No. MC-2004-0271, 2004 WL 1813292 (Mo. P.S.C. 2004), Order Rejecting Stipulated Agreement and Setting Prehearing Conference, issued July 8, 2004 (negotiated agreement is not structured in a manner consistent with the public interest); *In re St. Joseph Light and Power Company*, Case No. ER-93-41 and, Case No. EC-93-252, 1993 WL 449447 (Mo. P.S.C. 1993), Report and Order, issued June 25, 1993, (Commission rejected proposed settlement agreement between its Staff and SJLPC on the issue of rate design finding it to be inconsistent with prior Commission Order in Case No. EO-88-158).

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inclusion of findings of fact are required. *State ex rel. Rice v. Public Service Comm'n et al.*, 220 S.W.2d 61, 65 (1949). In *State ex rel. Monsanto Company v. Public Service Comm'n, et al.*, 716 S.W.2d 791 (Mo. Banc 1986) the Commission staff conceded that this requirement is embodied in Section 386.420(2) RSMo (2000) (formerly, § 5688 RSMo 1939). Any contention that written findings of fact in Commission Orders are unnecessary is not consistent with statute and flies in the face of the directives of this state's appellate courts.

Even though Section 536.090 RSMo states that every decision and Order in a contested case shall include or be accompanied by findings of fact and conclusions of law which shall be stated separately "except in default cases or cases disposed of by stipulation, consent order or agreed settlement", this *does not* eliminate the obligation of the Commission to make findings, and further, describe those findings in its Orders. This point was announced in *Rice*, and later upheld by *Fischer v. Public Service Comm'n*, 645 S.W. 39 (Mo. App. W.D. 1982). *Fischer*, as a case which was settled by stipulation and agreement, controls this Commission regarding the application of 536.090 RSMo, and the requirements for the Orders in these cases. *Fischer* held that the inclusion of findings of fact in Commission Orders is not a matter of style but is a *legal requirement*. *Id.* at 44. Missouri Courts interpreting Section 386.420 have held that in contested cases (i.e. proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing), the Commission must include findings of fact in its written reports.⁴ Merely adopting a stipulation and agreement is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18. In these cases, this has not occurred.⁵

An Order can be insufficient as to findings of fact in at least two ways: (1) clear omission of findings of fact, and (2) the failure of

⁴ Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-796 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982). The competent and substantial evidence standard of Article V, Section 18, however, does not apply to administrative cases in which a hearing is not required by law. *State ex rel. Public Counsel v. Public Serv. Comm'n*, 210 S.W.3d 344, 354-355 (Mo. App. 2006), abrogating holdings in *State ex rel. Coffman v. Public Serv. Comm'n*, 121 S.W.3d 534 (Mo. App. 2003) and *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm'n*, 150 S.W.3d 92, 101 (Mo. App. 2004) where the court of appeals had decided findings of fact were required in non-contested cases.

⁵ *Id.*

purported findings of fact to actually constitute “findings of fact.” In *State of Missouri, ex. rel. Noranda Aluminum, Inc. v. Public Service Comm’n*, 24 S.W.3d 243, 245 (Mo. App. W.D. 2000), a Commission Order that purported to contain “extensive findings of fact”, “including more than 27 pages”, was found to be nothing more than “a general discussion of the parties’ positions and a brief explanation of which position the commission deemed correct.” The *Noranda* Court was especially harsh on the Commission’s failure to follow the Court’s prior directives:

The Commission apparently ignored our admonition to one [sic] its sister administrative agencies: [M]erely reciting the testimony ... does not establish which of the facts set forth in the [recitation] the [agency] found to be true. [An agency] must make unequivocal, affirmative findings of the facts. *Parrot v. HQ, Inc.*, 907 S.W.2d 236, 244 (Mo. App. 1995). *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655, 661 (Mo. App. 1997). [Mere recitation of testimony] is of no help to us in determining what facts the [agency] found. It provides nothing for a meaningful judicial review. Nor did the Commission seem to note our earlier admonition that, “[w]ithout specific findings of fact ..., it is impossible to determine whether the action of the [agency] was supported by substantial evidence.” *Webb v. Board of Police Commissioners of Kansas City*, 694 S.W. 2d 927, 929 (Mo. App. 1985)

State of Missouri, ex rel. v. Noranda Aluminum, Inc., 24 S.W.3d 243, 246 (Mo. App. W.D. 2000). Unfortunately, this Commission continues to ignore the clear directives of the Court of Appeals. It appears to me that the Commission’s Orders in these cases rely solely on *legal conclusions* propounded by parties as a way to bootstrap the conclusions reached in the Orders. Accordingly, the Orders include no written factual basis for support.

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Neither the Staff of the Commission, or any party appearing before the Commission, possess the statutory authority to make *legal* conclusions regarding “just and reasonable rates”. That authority was granted by the legislature to the Commission, and the Commission alone.⁶ It is well settled that parties may not stipulate to conclusions of law.⁷ As in *Noranda*, the absence of “nonconclusory facts” to support the Order was found unacceptable, which is why here in these cases, the Commission should, upon its own motion, withdraw these Orders and have them rewritten to conform to the appropriate legal standard. New Orders must therefore state which facts on which the Commission has based its decisions to approve the agreements, lest this Commission be left to future admonishments by the appellate courts.

In addition to believing that the Commission should, upon its own motion, withdraw the Orders for revision to include findings of fact, I also believe that the Commission should initiate a rulemaking to amend 4 CSR 240-2.115 to: (1) provide clear guidance that findings of fact shall be included in Commission Orders in cases of stipulations and agreements; and (2) require parties to file proposed findings of facts and conclusions of law with any proposed stipulation and agreement they submit to the Commission for approval.

The Commission should not streamline its Orders at the expense of legal sufficiency, but should instead strive to ensure that every Order will pass legal muster specifically as to whether the findings of fact and conclusions of law are sufficient.⁸ Because deciding whether rates are just and reasonable is a *conclusion of law*, the Commission must independently and impartially review the facts of any case, including these cases where a proposed stipulation and agreement has been submitted for consideration. Here, I do not believe that the written Orders in these cases adequately detail that the Commission made such an independent and impartial review. I am by no means implying that such an independent and impartial review did not take place; in fact, this Commissioner did perform an independent and impartial review of the

⁶ Section 393.130 RSMo.

⁷ Litigants cannot stipulate as to questions of law. *State v. Biddler*, 599 S.W.2d 182, 186 and n.4 (Mo. Banc 1980). Further, the Commission must independently and impartially review the facts of any case. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. E.D. 1988).

⁸ *Deaconess Manor Ass'n v. Public Service Comm'n of State of Mo.*, 994 S.W. 2d 602 (Mo. App. W.D. 1999).

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facts in these cases. Based upon my review of the proposed agreements, relevant testimony in the record, and arguments presented at the June 8, 2009, stipulation hearing, I have made an independent conclusion that the agreements proposed, and in all respects provide, just and reasonable rates that are in the public interest, while ensuring safe and adequate service.

Therefore, despite my concerns about the form of the Orders, I concur.

In the Matter of Mid MO Sanitation, LLC's Application for a Certificate of Convenience and Necessity Authorizing It to Own, Operate, Maintain, Control, and Manage, a Sewer System in Callaway County, Missouri.

*File No. SA-2009-0319
Decided June 10, 2009*

Evidence, Practice and Procedure §8. The Commission considered the facts described in Staff's recommendation in deciding to approve a unanimous stipulation and agreement, but found that no other party was bound by any statement of fact contained in Staff's recommendation.

**ORDER GRANTING PUBLIC COUNSEL'S REQUEST FOR
CLARIFICATION OF ORDER APPROVING
STIPULATION AND AGREEMENT**

On June 3, 2009, the Commission issued an order approving a unanimous stipulation and agreement filed by Mid MO Sanitation LLC, Staff, and the Office of the Public Counsel regarding Mid MO's application seeking a certificate of convenience and necessity to own, operate, maintain, control, and manage a sewer system in Callaway County, Missouri. On June 4, Public Counsel filed a request for clarification regarding the June 3 order.

Public Counsel is concerned about a statement in the Commission's order indicating the Commission had reviewed the "undisputed facts described in Staff's recommendation" in deciding that the stipulation and agreement is reasonable. Public Counsel points out that it does dispute some of the facts in Staff's recommendation and asks the Commission to indicate exactly which facts it found to be undisputed.

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Staff filed its recommendation regarding Mid MO's application on May 1. That recommendation contains an extensive description of the services provided by Mid MO and indicates why Mid MO's customers need those services. Staff also recommended the rates the Commission should approve for Mid MO to initially charge its new customers. The unanimous stipulation and agreement, in which Public Counsel and Mid Mo joined, establishes initial customer rates that are somewhat lower than the rates recommended by Staff. It also establishes that Mid MO's annual revenue requirement of \$22,500 is subject to a customer refund or credit based on the results of a small utility rate case that the company is required to institute within 90 days.

The unanimous stipulation and agreement also indicates the parties agree that granting Mid MO a certificate of convenience and necessity to own and operate a sewer system is necessary or convenient for the public service. The stipulation and agreement does not, however, provide any stipulated facts about the services Mid MO will be providing to the public. Since the parties agreed that granting Mid MO a certificate of convenience and necessity was necessary or convenient for the public service, the Commission assumed that Staff's description of the service Mid MO would be providing was undisputed, with the only disputed portion of Staff's recommendation being the portion related to the initial rates Mid MO should be allowed to charge its customers. The Commission considered those facts regarding the service Mid MO would be providing only as part of its overall determination that the stipulation and agreement was reasonable.

However, as Public Counsel indicates, if it had not entered into the stipulation and agreement, Public Counsel might have disputed some or all of the facts contained in Staff's recommendation. Therefore, Public Counsel is in no way bound by any statement of fact contained in Staff's recommendation.

THE COMMISSION ORDERS THAT:

1. Public Counsel's Request for Clarification is granted.
2. The Order Approving Stipulation and Agreement issued June 3, 2009, effective June 13, 2009, is clarified as indicated in this order.
3. This order shall become effective on June 13, 2009.

Clayton, Chm., Davis, Jarrett,
and Gunn, CC., concur.

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Woodruff, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

NOTE: Another order in this case can be found at page 542.

In the Matter of the Application of Highway H Utilities, Inc. for a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Water and Sewer System for the Public in an Unincorporated Area of Pulaski County, Missouri

File No. WA-2009-0316, et al

Decided June 18, 2009

Sewer §2. The Commission found that Highway H Utilities' request for authority to own and operate a water and sewer system is necessary or convenient for the public service.

Water §2. The Commission found that Highway H Utilities' request for authority to own and operate a water and sewer system is necessary or convenient for the public service.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND
NECESSITY**

On March 5, 2009, Highway H Utilities, Inc. filed an application seeking a certificate of public convenience and necessity to construct, install, own, operate, control, manage, and maintain water and sewer systems for the public in an unincorporated area of Pulaski County, Missouri. Highway H currently provides regulated water and sewer service in that area and the application seeks authority to expand that water and sewer service to serve a new subdivision.¹

On March 9, the Commission ordered that notice of the application be given to the public and interested parties. The Commission directed that any person interested in intervening file an application to intervene no later than March 30. The Commission did not receive any requests to intervene.

¹ The Commission assigned separate file numbers for the water and sewer applications. Subsequently, File No. SA-2009-0317 was consolidated into File No. WA-2009-0316.

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On May 15, the Commission's Staff filed a recommendation advising the Commission to approve Highway H's application. Staff also recommended that the Commission require Highway H to charge its existing water and sewer rates in the expanded service area. Staff explained that Highway H has small water and sewer rate cases pending before the Commission and indicated appropriate rates could best be established through those cases.

Staff also recommended that the Commission approve specified depreciation accrual rates for Highway H. Additionally, Staff advised the Commission to require Highway H to submit copies of permits and approvals issued by the Department of Natural Resources for construction of necessary wells, treatment facilities, or other utility plant. If the company does not obtain any necessary DNR permits by August 1, 2009, Staff asked the Commission to require the company to submit status reports detailing its progress in obtaining those permits.

On May 21, the Office of the Public Counsel filed a response to Staff's recommendation. Public Counsel did not object to Staff's recommendation to grant Highway H's application. Public Counsel also accepted Staff's recommendation that Highway H be ordered to charge its existing rates in the expanded service area, but recommended that those rates for service to the expanded service area be made interim, subject to refund, based on the results of the pending small company rate cases. Public Counsel also recommended that the Commission direct Highway H to submit monthly status report regarding its efforts to obtain necessary DNR reports.

On June 1, Staff and Highway H replied to Public Counsel's response. Staff opposed making the rates in the expanded service area interim and subject to refund. Highway H was willing to accept making those rates interim and subject to refund, but only if the rates were made subject to surcharge if the pending rate case revealed that the company was under-earning.

In light of the disagreement among the parties, the Commission scheduled a prehearing conference for June 16. However, on June 9, Public Counsel filed an amended response to Staff's recommendation. Public Counsel now indicates its acceptance of Staff's rate recommendation and no longer seeks to treat those rates as interim and subject to refund. Accordingly, the Commission canceled the prehearing conference.

On June 17, Staff filed a supplement to its recommendation informing the Commission that the Department of Natural Resources has

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recently issued a Notice of Violation to Highway H regarding the effluent from its existing wastewater treatment facility. Staff indicated its recommendation to approve Highway H's application has not changed.

Based on the verified application submitted by Highway H, as well as the verified recommendation of its Staff, and the responses filed by Public Counsel, the Commission finds that granting Highway H's application for a certificate of convenience and necessity to provide water and sewer service to an expanded service area will serve the public interest. That application will be granted.

The Commission reminds Highway H that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

A) The obligation to file an annual report, as established by Section 393.140(6), RSMo 2000. Failure to comply with this obligation will make the utility liable to a penalty of \$100 and an additional \$100 per day that the violation continues. Commission Rule 4 CSR 240-3.640 requires water utilities to file their annual report on or before April 15 of each year. Commission Rule 4 CSR 240-3.335 imposes the same requirement on sewer utilities.

B) The obligation to pay an annual assessment fee established by the Commission, as required by Section 386.370, RSMo 2000. Because assessments are facilitated by order of the Commission, failure to comply with the order will subject the company to penalties ranging from \$100 to \$2000 for each day of noncompliance pursuant to Section 386.570, RSMo 2000.

C) The obligation to provide safe and adequate service at just and reasonable rates, pursuant to Section 393.130, RSMo (Supp. 2008).

D) The obligation to comply with all relevant state and federal laws and regulations, including but not limited to, rules of this Commission, the Department of Natural Resources, and the Environmental Protection Agency.

E) The obligation to comply with orders issued by the Commission. If the company fails to comply it is subject to penalties for noncompliance ranging from \$100 to \$2000 per day of noncompliance, pursuant to Section 386.570, RSMo 2000.

F) The obligation to keep the Commission informed of its current address and telephone number.

This certificate is granted conditioned upon the compliance of the company with all of these obligations.

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Moreover, if the Commission finds, upon conducting a hearing, that the company fails to provide safe and adequate service, or has defaulted on any indebtedness, the Commission shall petition the circuit court for an order attaching the assets, and placing the company under the control of a receiver, as permitted by Section 393.145, RSMo Supp. 2008. As a condition of granting this certificate, the company hereby consents to the appointment of a temporary receiver until such time as the circuit court grants or denies the petition for receivership.

The company is also placed on notice that Section 386.310.1, RSMo 2000, provides that the Commission can, without first holding a hearing, issue an order in any case "in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property."

Furthermore, the company is reminded that, as a corporation, its officers may not represent the company before the Commission. Instead, the corporation must be represented by an attorney licensed to practice in Missouri.

THE COMMISSION ORDERS THAT:

1. Highway H Utilities, Inc. is granted permission, approval, and a certificate of convenience and necessity to construct, install, own, operate, control, manage, and maintain water and sewer systems for the public in Pulaski County, Missouri, as more particularly described in Appendix 1 to its application.

2. This certificate of convenience and necessity is granted upon the conditions set out in the body of this order.

3. Highway H. Utilities, Inc. shall comply with all Missouri statutes and Commission rules.

4. Highway H Utilities, Inc. shall charge its existing water and sewer rates to customers located in the newly certificated service area.

5. Highway H. Utilities, Inc. shall submit, no later than July 28, 2009, new or revised tariff sheets for its existing water and sewer tariffs to include a map and written description of the expanded Northern Heights Subdivision service area, with the tariff sheets to bear an effective date that is at least thirty days from the date the tariff sheets are submitted to the Commission.

6. The depreciation rates recommended by Staff within attachments A and B to its recommendation are approved for use by Highway H Utilities, Inc. for its existing and newly certificated service areas.

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7. Highway H Utilities, Inc. shall submit to the manager of the Commission's water and sewer department, and to the Office of the Public Counsel, copies of permits and approvals issued by the Department of Natural Resources for the construction of wells, tanks, treatment facilities, or other utility plant contemplated by plans approved by the Department of Natural Resources, within thirty days after such approval.

8. In the event Highway H Utilities, Inc. does not obtain and forward any necessary Department of Natural Resources permits by August 1, 2009, Highway H Utilities, Inc. shall submit a status report to the manager of the Commission's water and sewer department and to the Office of the Public Counsel, describing the company's good faith attempts to obtain the necessary permits, including, but not limited to, the preparation and submission of information required by the Department of Natural Resources for approval and issuance of such permits.

9. After August 1, 2009, Highway H. Utilities, Inc. shall provide any additional status reports requested by either the manager of the Commission's water and sewer department or the Office of the Public Counsel, without the necessity of an additional order from this Commission.

10. Nothing in this order shall bind the Commission on any ratemaking issue in any future rate proceeding.

11. The certificate of convenience and necessity granted to Highway H Utilities, Inc. in this order shall become effective at that same time as the new or revised implementing tariffs to be submitted by the company become effective.

12. This order shall become effective on June 28, 2009.

Clayton, Chm., Davis, Jarrett,
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

ASSESSMENT FISCAL YEAR 2010

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In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2009

Case No. AO-2009-0445

Decided June 24, 2009

Public Utilities §1. The Commission established the amount assessed against Missouri utilities in the 2010 fiscal year.

ASSESSMENT ORDER FOR FISCAL YEAR 2010

Pursuant to 386.370, RSMo Supp. 2008, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2009. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$19,193,564. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$10,620,110. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$8,573,454.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$313,807. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2009, is estimated to be \$1,823,409. The Commission deducts these amounts and estimates its Fiscal Year 2010 Assessment to be \$17,056,348. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2008, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at

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<http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric	\$ 7,498,997
Gas.....	\$ 4,291,111
Heating.....	\$ 330,974
Water.....	\$ 1,601,784
Sewer	\$ 571,315
Telephone	\$ 2,762,167
Total	\$17,056,348

The Commission allocates a proportionate share of the \$17,056,348 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2009. The assessment shall be due and payable on or before July 15, 2009, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2009, October 15, 2009, January 15, 2010, and April 15, 2010. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
Budget and Fiscal Services Department
P.O. Box 360
Jefferson City, MO, 65102-0360

IT IS ORDERED THAT:

1. The assessment for fiscal year 2010 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.

ASSESSMENT FISCAL YEAR 2010

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3. On behalf of the Commission, the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2009.

4. Each public utility shall pay its assessment as set forth herein.

5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

6. This order shall become effective on July 1, 2009.

Clayton, Chm., Davis, Jarrett, and
Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

DIGEST OF REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI

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ACCOUNTING

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-

ACCOUNTING

I. IN GENERAL

§4. Jurisdiction and powers of the State Commission

The Federal Energy Regulatory Commission has given deference to state commissions to make the distinction between electric distribution and transmission facilities. — The Empire District Electric Company 18 MPSC 3d 540.

III. PARTICULAR ITEMS

§19. Fixed assets

The Commission authorized The Empire District Electric Company to use the Southwest Power Pool's criteria and definition to classify transmission and distribution assets placed in service after January 1, 2008; resulting in no changes to the company's current classification of investment in those facilities. — The Empire District Electric Company 18 MPSC 3d 540.

§42. Accounting Authority Orders

To be treated as an expense under an Accounting Authority Order, the item must: be of unusual nature; be of infrequent occurrence; be of significant effect; be abnormal and significantly different from the ordinary and typical activities of the company; and, not reasonable be expected to recur in the foreseeable future.—Missouri Gas Energy 18 MPSC 3d 285.

The clean-up of a former manufactured gas plant sites is not of such significant size and substantial cost to be considered extraordinary or unusual. —Missouri Gas Energy 18 MPSC 3d 285.

Because costs associated with the clean-up of former manufactured gas plant sites were incurred annually, those costs are not infrequent. —Missouri Gas Energy 18 MPSC 3d 285.

In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.—Missouri Gas Energy 18 MPSC 3d 303.

CERTIFICATES

I. IN GENERAL

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- §3. Obligation of the utility**

II. JURISDICTION AND POWERS

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- §8. Jurisdiction and powers over interstate operations**
- §9. Jurisdiction and powers over operations in municipalities**
- §10. Jurisdiction and powers over the organizations existing prior to the Public Service Commission law**

III. WHEN A CERTIFICATE IS REQUIRED

- §11. When a certificate is required generally**
- §12. Certificate from federal commissions**
- §13. Extension and changes**
- §14. Incidental services or operations**
- §15. Municipal limits**
- §16. Use of streets or public places**
- §17. Resumption after service discontinuance**
- §18. Substitution or replacement of facilities**
- §19. Effect of general laws, franchises and licenses**
- §20. Certificate as a matter of right**

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS

- §21. Grant or refusal of certificate generally**
 - §21.1. Public interest**
 - §21.2. Technical qualifications of applicant**
 - §21.3. Financial ability of applicant**
 - §21.4. Economic feasibility of proposed service**
- §22. Restrictions and conditions**
- §23. Who may possess**
- §24. Validity of certificate**
- §25. Ability and prospects of success**
- §26. Public safety**
- §27. Charters and franchises**
- §28. Contracts**
- §29. Unauthorized operation or construction**

- §30. Municipal or county action
- §31. Rate proposals
- §32. Competition or injury to competitor
- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

V. PREFERENCE BETWEEN RIVAL APPLICANTS – FACTORS

- §36. Preference between rival applicants generally
- §37. Ability and responsibility
- §38. Existing or past service
- §39. Priority of applications
- §40. Priority in occupying territory
- §41. Rate proposals

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority
- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

VII. OPERATION UNDER TERMS OF THE CERTIFICATE

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

VIII. TRANSFER, MORTGAGE OR LEASE

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
- §54. Dissolution
- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
- §59. Sale of certificate rights

IX. REVOCATION, CANCELLATION AND FORFEITURE

- §60. Revocation, cancellation and forfeiture generally**
- §61. Acts or omissions justifying revocation or forfeiture**
- §62. Necessity of action by the Commission**
- §63. Penalties**

CERTIFICATES

I. IN GENERAL

§1. Generally

The Commission cancelled the certificate of service authority after giving notice and receiving no response.—Winstar Communications, LLC 18 MPSC 3d 101.

DEPRECIATION

I. IN GENERAL

- §1. Generally**
- §2. Right to allowance for depreciation**
- §3. Reports, records and statements**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commission**
- §8. Jurisdiction and powers of local authorities**

III. BASIS FOR CALCULATION

- §9. Generally**
- §10. Cost or value**
- §11. Property subject to depreciation**
- §12. Methods of calculation**
- §13. Depreciation rates to be allowed**
- §14. Rates or charges for service**

IV. FACTORS AFFECTING ANNUAL ALLOWANCE

- §15. Factors affecting annual allowance generally**
- §16. Life of enterprise**

- §17. Life of property
- §18. Past depreciation
- §19. Charges to maintenance and other accounts
- §20. Particular methods and theories
- §21. Experience
- §22. Life of property and salvage
- §23. Sinking fund and straight line
- §24. Combination of methods

V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
- §29. Investment and use
- §30. Earnings on reserve

VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
- §32. Gas
- §33. Heating
- §34. Telecommunications
- §35. Water

DEPRECIATION

I. IN GENERAL

§1. Generally

The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small water company revenue increase request.—Aqua Missouri, Inc. 18 MPSC 3d 38.

The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small sewer company revenue increase request.—Aqua Missouri, Inc. 18 MPSC 3d 47.

The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small sewer company revenue increase request.—Aqua Missouri, Inc. 18 MPSC 3d 56.

The Commission approved the depreciation rates attached to the unanimous agreement regarding disposition of small water company revenue increase request.—Aqua Missouri, Inc. 18 MPSC 3d 65.

DISCRIMINATION

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Recovery of damages for discrimination**
- §4. Recovery of discriminatory undercharge**
- §5. Reports, records and statements**

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of the local authorities**

III. RATES

- §9. Competitor's right to equal treatment**
- §10. Free service**
- §11. Inequality of rates**
- §12. Methods of eliminating discrimination**
- §13. Optional rates**
- §14. Rebates**
- §15. Service charge, meter rental or minimum charge**
- §16. Special rates**
- §17. Rates between localities**
- §18. Concessions**

IV. RATES BETWEEN CLASSES

- §19. Bases for classification and differences**
- §20. Right of the utility to classify**
- §21. Reasonableness of classification**

V. RATES AND CHARGES OF PARTICULAR UTILITIES

- §22. Electric and power**
- §23. Gas**
- §24. Heating**
- §25. Telecommunications**
- §26. Sewer**
- §27. Water**

VI. SERVICE IN GENERAL

- §28. Service generally**
- §29. Abandonment and discontinuance**
- §30. Discrimination against competitor**
- §31. Equipment, meters and instruments**
- §32. Extensions**
- §33. Preference during shortage of supply**

§34. Preferences to particular classes or persons

VII. SERVICE BY PARTICULAR UTILITIES

§35. Electric and power

§36. Gas

§37. Heating

§38. Sewer

§39. Telecommunications

§40. Water

DISCRIMINATION

I. IN GENERAL

§1. Generally

It would be inappropriate to adjust a few depreciation rates without looking at all depreciation rates in a complete depreciation study.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

ELECTRIC

I. IN GENERAL

§1. Generally

§2. Obligation of the utility

§3. Certificate of convenience and necessity

§4. Transfer, lease and sale

§4.1. Change of suppliers

§5. Charters and franchise

§6. Territorial agreements

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers generally

§8. Jurisdiction and powers of Federal Commissions

§9. Jurisdiction and powers of the State Commission

§10. Jurisdiction and powers of the local authorities

§11. Territorial agreements

§12. Unregulated service agreements

III. OPERATIONS

§13. Operations generally

§14. Rules and regulations

§15. Cooperatives

§16. Public corporations

§17. Abandonment and discontinuance

§18. Depreciation

§19. Discrimination

- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

ELECTRIC

I. IN GENERAL

§1. Generally

The Commission recognized the name change since the Commission had the opportunity to render a decision on the motions for rehearing regarding the merger. Thus there was no indication or evidence that recognizing the proposed name change would be against the public interest. --Aquila, Inc., d/b/a Aquila Networks 18 MPSC 3d 22.

The Commission rejected Aquila's application for authority to transfer operational control of certain assets because approving the application would prevent Aquila from choosing a better alternative, which would be detrimental to the public interest.—Aquila, Inc., d/b/a Aquila Networks 18 MPSC 3d 106.

Missouri Public Service Commission recognized name change from Aquila, Inc., d/b/a Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company.—Aquila, Inc., d/b/a KCP&L Greater Missouri Operations Company 18 MPSC 3d 274.

The Missouri Public Service Commission changes the case numbers for these dockets to reflect their legal classification as workshops and not contested cases.—PURPA 18 MPSC 3d 417.

Having changed the file numbers of these dockets to properly reflect their legal classification as workshops and not contested cases, the Missouri Public Service Commission closes these file numbers and directs the workshop participants to file information under the corrected file numbers.—PURPA 18 MPSC 3d 423.

The Missouri Public Service Commission grants KCP&L Greater Missouri Operating Company ("GMO") a conditional waiver of fifteen specified technical requirements of the Commission's Integrated Resource Planning Rule ("IRP"), i.e. 4 CSR 240-22, for its upcoming IRP filing.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 461.

The Missouri Public Service Commission grants KCP&L Greater Missouri Operations Company ("GMO") a certificate of public convenience and necessity to construct, install, own, operate, maintain, and otherwise control and manage electrical power production and related facilities at the South Harper Facility consisting of three 105 MW natural gas-fired combustion turbines and an associated transmission substation.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The Commission approves a non-unanimous stipulation and agreement and concludes the proposed increase in overall Missouri gross annual electric revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or similar fees or taxes, of \$95 million (\$10 million of which is composed by Additional Amortization to Maintain Financial Ratios), effective for electric services rendered on and after September 1, 2009, is just and reasonable and is fair to both the utility and its customers. – Kansas City Power & Light Company 18 MPSC 3d 545.

The Commission concludes that an equal percentage, across-the-board, spread of the rate increase, with the exception of the deviations outlined with regard to the Large Power Class and separately-metered space heating and winter energy blocks on the all-electric rates for general service classes is just and reasonable. – Kansas City Power & Light Company 18 MPSC 3d 545.

The Commission approves a non-unanimous stipulation and agreement regarding pensions and other post employment benefits concluding its terms are just and reasonable. – Kansas City Power & Light Company 18 MPSC 3d 545.

§3. Certificate of convenience and necessity

Section 393.170 authorizes the Commission to grant a certificate of convenience and necessity ("CCN") when it determines, after due hearing, that the proposed project is necessary or convenient for the public service.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The Commission has articulated five specific criteria to be used when evaluating applications for electric utility CCNs. The applicant must prove: (1) there is a need for the service; (2) it is qualified to provide the proposed service; (3) it has the financial ability to provide the service; (4) its proposal is economically feasible; and (5) the service promotes the public interest. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The public interest is a matter of policy to be determined by the Commission. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The “public interest” necessarily must include the interests of both the ratepaying public and the investing public; however, the rights of individual groups are subservient to the rights of the public in general. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

§4. Transfer, lease and sale

The Commission denied Public Counsel’s application for rehearing because it correctly applied the not detrimental to the public interest standard by allowing the Applicants to establish that there was no competent evidence in the report that there would be any public detriment in relation to the company’s credit-worthiness due to the merger. --Great Plains Energy Incorporated Kansas City Power & Light Company, and Aquila, Inc. 18 MPSC 3d 1.

§4.1. Change of suppliers

Change of suppliers was in the public interest because it allowed electrical corporation and municipal utility to serve customers more efficiently.—The Empire District Electric Company 18 MPSC 3d 299.

Section 91.025.2, RSMo 2000, gives the Commission authority to order a change of suppliers for property served by a municipally owned or operated electric power system on the basis that the change is in the public interest for a reason other than a rate differential. Safety concerns, Rich Hill’s efforts to address those concerns, Rich Hill’s and Osage Valley’s support of the request, and Osage Valley’s energy audit program are all factors supporting a Commission finding that the change in suppliers would be in the public interest for a reason other than a rate differential. – Osage Valley Electric Cooperative 18 MPSC 3d 534.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers generally

Personal jurisdiction is irrelevant in workshop matters because the Commission is not taking any action affecting any public utilities under its jurisdiction, supervision or control.—PURPA 18 MPSC 3d 417.

Personal jurisdiction is irrelevant in workshop matters because the Commission is not taking any action affecting any public utilities under its jurisdiction, supervision or control.—PURPA 18 MPSC 3d 423.

GMO is an “electrical corporation” and a “public utility,” as defined in Sections 386.020(15) and (43), RSMo Cum. Supp. 2008, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 461.

GMO is an “electrical corporation” and a “public utility,” as defined in Sections 386.020(15) and (43), RSMo Cum. Supp. 2008, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Section 393.170, confers subject matter jurisdiction to the Commission for granting CCNs. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Section 393.170 grants the Commission approval authority only if that authority is exercised prior to start of construction. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The Commission has the authority to grant GMO a post-construction CCN for the South Harper power plant and the Peculiar substation pursuant to Section 393.171, RSMo, Cum. Supp. 2008. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

KCPL is an “electrical corporation” and a “public utility,” as defined in Sections 386.020(15) and (43), RSMo Cum. Supp. 2008, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. — Kansas City Power & Light Company 18 MPSC 3d 545.

§9. Jurisdiction and powers of the State Commission

The Commission has authority to suspend KCPL's submitted tariff pursuant to Section 393.150, RSMo 2000. — Kansas City Power & Light Company 18 MPSC 3d 545.

The Commission has the statutory mandate to ensure safe and adequate service at just and reasonable rates pursuant to Section 393.130, RSMo 2000. — Kansas City Power & Light Company 18 MPSC 3d 545.

The Commission is vested with the state's police power to set just and reasonable rates for public utility services, subject to judicial review of the question of reasonableness. — Kansas City Power & Light Company 18 MPSC 3d 545.

The standard for evaluating proposed rate involves an examination of the “public interest,” which is a matter of policy to be determined by the Commission. — Kansas City Power & Light Company 18 MPSC 3d 545.

§10. Jurisdiction and powers of the local authorities

On July 31, 2008, the Cass County Commission voted 3-0 to approve the South Harper Plant special use permit application. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

On February 3, 2009, the City of Peculiar's Board of Aldermen approved the special use permit application for GMO's Peculiar Substation. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

GMO obtained all local, state and nationally required permits for construction of the facilities including: Cass County Construction Permit; Cass County Road, Bridge and Driveway Permit; Public Water Supply District Number 7 Water Supply Agreement; West Peculiar Fire Protection District Fire Protection Agreement; Missouri Department of Natural Resources Construction and Operation Permits; National Pollution Discharge Elimination System (“NPDES”) Land Disturbance Permit; NPDES Land Irrigation Permit; and the Cass

County Health Department Sanitary Water/Sewage Permit.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

III. OPERATIONS

§14. Rules and regulations

Commission Rule 4 CSR 240-22.080(11) allows the Commission to waive any provision of the IRP rule upon a showing of good cause.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 461.

Good cause for a waiver of Commission rules means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law. To constitute *good* cause, the reason or legal excuse given must be real not imaginary, substantial not trifling, and reasonable not whimsical. And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 461.

Commission Rule 4 CSR 240-3.015 provides the Commission with authority to grant a waiver or variance from its filing rules in Chapter 3. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Commission Rule 4 CSR 240-2.060 delineates the filing requirement for requested waivers or variances from Chapter 3 waiver filing requirements. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The “good cause” requirement for granting a waiver or variance is satisfied upon a legitimate factual showing of a substantial cause or reason for excusing the legal requirement. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Commission Rule 4 CSR 240-3.105(1)(B)2, requires an applicant for a CCN to submit a study containing the plans and specifications for the project and the estimated cost of construction. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

GMO demonstrated good cause existed to excuse it from the filing requirements of Commission Rule 4 CSR 240-3.105(1)(B)2 because the facilities were already constructed and the actual cost of that construction was already known.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Commission Rules 4 CSR 240-2.060, 3.030 and 3.160 outline the minimum filing requirements for rate increase requests. – Kansas City Power & Light Company 18 MPSC 3d 545.

§20. Rates

The Commission approved a stipulation and agreement that resolved all fuel adjustment clause tariff rate design issues in the underlying rate case.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 297.

Parties regularly engage in settlement negotiations and resolve their disputes with “black box” settlements arriving at a final revenue requirement number that they all find acceptable without revealing how the parties arrived at that number. Kansas City Power & Light Company 18 MPSC 3d 545.

The Commission approved a stipulation and agreement that resolved KCP&L Greater Missouri Operations Company's request for a general rate increase. – KCP&L Greater Missouri Operations Company 18 MPSC 3d 575.

§22. Revenue

The Commission approved a stipulation and agreement that resolved all off-system sales related issues in the underlying rate case.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 295.

§26. Valuation

Parties regularly engage in settlement negotiations and resolve their disputes with “black box” settlements arriving at a final revenue requirement without agreeing upon a utility’s rate base. – Kansas City Power & Light Company 18 MPSC 3d 545.

§29. Rate of return

Neither the DCF, Risk Premium, nor CAPM methods for estimating a company’s fair rate of return on equity is any more “correct” than any other method in all circumstances and analysts balance their use of all three methods to reach a recommended return on equity.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

The average allowed return on equity awarded to electric utilities provides a reasonableness test for the recommendations offered by the rate of return on equity experts. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

The Commission found the use of a quarterly DCF model to be preferable to the use of an annual DCF model in a DCF analysis.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

The Commission found the return on equity advocated by Staff’s witness to be unreasonably low and not to be credible.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

Parties regularly engage in settlement negotiations and resolve their disputes with “black box” settlements arriving at a final revenue requirement without agreeing upon a rate of return. – Kansas City Power & Light Company 18 MPSC 3d 545.

§33. Maintenance

Because AmerenUE met its goal of having its distribution system trimmed on a four-year cycle for its urban area, and a six-year cycle for its rural areas, the Commission ended AmerenUE’s duty to continue to file quarterly and annual reports on its vegetation management practices. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 460.

§40. Reports, records and statements

The purpose of the IRP filing is to ensure that investor-owned electric utilities, such as KCP&L-GMO, consider all options, including demand side efficiency and energy management measures, to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 461.

Kansas City Power & Light Company (hereafter “KCP&L”) filed its integrated resource plan (IRP), as required by 4 CSR 240 – Chapter 22. The purpose of the Commission’s integrated resource planning rule is to require Missouri’s electric utilities to undertake an adequate planning process to ensure that the public interest in a reasonably priced, reliable, and efficient energy supply is protected. – Kansas City Power & Light Company 18 MPSC 3d 515.

The Commission granted Ameren a variance from the filing requirements of rules 4 CSR 240-3.185(1) and (2) to allow the filing required by those rules to be made as non-case related submissions. – Union Electric Company d/b/a AmerenUE 18 MPSC 3d 521.

§42. Planning and management

The proceeding to consider the company's Integrated Resource Plan is not a "contested case" under Chapter 536 RSMo and therefore no hearing is required before the Commission addresses identified deficiencies in the plan.—Union Electric Company 18 MPSC 3d 432.

AmerenUE's 2008 Integrated Resource Plan and resource acquisition strategy did not demonstrate compliance with the Commission's IRP rule, and the Commission ordered the company to file its next IRP a year early. —Union Electric Company 18 MPSC 3d 432.

The Commission modified its final order to extend the filing date for AmerenUE next IRP filing from April 1, 2010 to June 1, 2010.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 464.

With demand increasing in GMO's Missouri service area, including Cass County, and the need for year-round peaking capability, the South Harper Facility's three 105 MW simple-cycle CTs provide greater flexibility to meet the needs of the GMO's customers. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Granting GMO's Application is in the public interest because the electrical power generated by the South Harper Facility will be rate-based capacity available to serve the increasing demand for electrical power GMO's customers, and the Facilities improve the reliability of GMO's transmission system, improve the overall efficiency and economics of GMO's transmission operations, and provide reactive power to control voltage on the transmission network. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Commission Rule 4 CSR 240-22.010(1) provides that a Commission finding that a utility is in compliance with its Integrated Resource Plan rules is not to be construed as Commission approval of the utility's resource plans, resource acquisition strategies or investment decisions. – Kansas City Power & Light Company 18 MPSC 3d 515.

§43. Accounting Authority orders

The Commission granted AmerenUE an AAO regarding ice storm restoration costs and ordered that a five-year amortization of those costs begin at the date rates established in this rate case went into effect. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

§45. Decommissioning costs

The Commission approved a stipulation and agreement regarding KCP&L's decommissioning fund for the Wolf Creed Generating Station and found that decommissioning expense accruals and trust fund payments should remain at current levels. – Kansas City Power & Light Company 18 MPSC 3d 518.

Ameren's retail jurisdictional annual decommissioning expense accruals and trust fund payment shall continue at the current level of \$6,486,378, are included in Ameren's current cost of service and are reflected in its current rates for ratemaking purposes. – Union Electric Company d/b/a AmerenUE 18 MPSC 3d 521.

IV. RELATIONS BETWEEN CONNECTING COMPANIES

§46. Relations between connecting companies generally

The Commission approved a Stipulation and Agreement facilitating KCP&L Greater Missouri Operations Company's participation in the Southwest Power Pool, Inc. by allowing KCP& L to transfer functional control of its assets to the Southwest Power Pool, Inc.— KCP&L Greater Missouri Operations Company, 18 MPSC 3d 414.

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

- §1. Generally**
- §2. Jurisdiction and powers**
- §3. Judicial notice; matters outside the record**
- §4. Presumption and burden of proof**
- §5. Admissibility**
- §6. Weight, effect and sufficiency**
- §7. Competency**
- §8. Stipulation**

II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally**
- §10. Admissions**
- §11. Best and secondary evidence**
- §12. Depositions**
- §13. Documentary evidence**
- §14. Evidence by Commission witnesses**
- §15. Opinions and conclusions; evidence by experts**
- §16. Petitions, questionnaires and resolutions**
- §17. Photographs**
- §18. Record and evidence in other proceedings**
- §19. Records and books of utilities**
- §20. Reports by utilities**
- §21. Views**

III. PRACTICE AND PROCEDURE

- §22. Parties**
 - §23. Notice and hearing**
 - §24. Procedures, evidence and proof**
 - §25. Pleadings and exhibits**
 - §26. Burden of proof**
 - §27. Finality and conclusiveness**
 - §28. Arbitration**
 - §29. Discovery**
 - §30. Settlement procedures**
 - §31. Mediator**
 - §32. Confidential evidence**
 - §33. Defaults**
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EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§1. Generally

In compliance with a mandate from the Missouri Supreme Court, the Commission vacated an order that approved a rate case compliance tariff on an expedited basis.—The Empire District Electric Company 18 MPSC 3d 265.

The Commission denied all pending application for rehearing, finding that there was not sufficient reason to rehear its decision.—The Empire District Electric Company 18 MPSC 3d 273.

§3. Judicial notice; matters outside the record

Pursuant to Section 536.070, RSMo 2000, agencies shall take official notice of all matters of which the courts take judicial notice and courts may take judicial notice of other proceedings when the cases are interwoven or interdependent.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

§8. Stipulation

Although an agreement entered into by fewer than all of the parties is non-unanimous, if no party objects to the agreement the Commission may treat the agreement as unanimous.—Missouri-American Water Company 18 MPSC 3d 266.

Every decision and order in a contested case shall be in writing and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, shall include findings of fact and conclusions of law.—Missouri-American Water Company 18 MPSC 3d 266.

In a small sewer rate case, the utility and Staff arrived at a disposition agreement. Public Counsel objected. After suspending the utility's tariff due to Public Counsel's objection, the Commission ultimately approved a unanimous stipulation and agreement among Public Counsel, Staff, and the utility.—WPC Sewer Company 18 MPSC 3d 453.

Adopting a stipulation and agreement in a contested case is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Contested cases are proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing. – Kansas City Power & Lights Company 18 MPSC 3d 545.

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without *separately stating* findings of fact and conclusions of law. – Kansas City Power & Light Company 18 MPSC 3d 545.

A stipulation and agreement that is entered into by fewer than all parties to a case is deemed to be a non-unanimous stipulation and agreement pursuant to Commission Rule 4 CSR 240-2.115(2)(A). – Kansas City Power & Light Company 18 MPSC 3d 545.

A non-unanimous stipulation and agreement may be treated as being unanimous if non-signatories parties fail to object. – Kansas City Power & Light Company 18 MPSC 3d 545.

Failure to file a timely objection to a non-unanimous stipulation and agreement constitutes a full waiver of that party's right to a hearing. — Kansas City Power & Light Company 18 MPSC 3d 545.

The Commission considered the facts described in Staff's recommendation in deciding to approve a unanimous stipulation and agreement, but found that no other party was bound by any statement of fact contained in Staff's recommendation. — Mid MO Sanitation, LLC 18 MPSC 3d 610.

III. PRACTICE AND PROCEDURE

§23. Notice and hearing

The Commission met its requirement for the hearing when it issued notice, allowed interested entities to intervene, and allowed an opportunity for any party to be heard on any identified issue in this matter.—KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

§24. Procedures, evidence and proof

Granting the Office of the Public Counsel's request for a stay is contrary to Public Counsel's previously stated position of not opposing an interim rate increase subject to refund.—Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 278.

Granting the Office of the Public Counsel's request for a stay is contrary to the public interest because it would jeopardize the provision of safe and adequate sewer service. — Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 278.

Contested cases are proceedings in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by stipulation without *separately stating* findings of fact and conclusions of law. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Pursuant to Section 386.420, the Commission must include findings of fact in its written report, even if not separately stated, in all contested cases. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Findings of fact must be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence. — KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Qualification of a witness as an expert rest within the fact-finder's discretion. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony." —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

An administrative agency as fact-finder receives deference when choosing between conflicting evidence. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.” — KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter, and when interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

§25. Pleadings and exhibits

Having merely restated the arguments raised during the pendency of this case, arguments that were addressed in prior interlocutory orders and the final Report and Order, the Commission finds no basis to grant the Office of the Public Counsel's application for rehearing. —Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 278.

Public Counsel's request is premature in that it fails to establish that Triumph has received the five-year benefit contemplated by the contract or that a general rate case is pending in which any action could be taken on the contract. — Missouri-American Water Company 18 MPSC 3d 535.

§26. Burden of proof

Failure to demonstrate a sufficient reason for granting an application for rehearing mandates denial. —Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 278.

As petitioner, GMO has the burden of proving that CCNs for the Facilities are necessary or convenient for the public service by the preponderance of the evidence standard. In order to meet the preponderance standard, GMO must convince the Commission it is “more likely than not” that the grant of the CCN is necessary or convenient for the public service.— KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

A party must provide a sufficient factual basis and legal theory to support the grant of the motion. — Missouri-American Water Company 18 MPSC 3d 535.

Public Counsel failed to establish a sufficient factual basis and legal theory to support the grant of its motion. — Missouri-American Water Company 18 MPSC 3d 535.

Pursuant to Section 393.150.2, RSMo 2000, as the party requesting the rate increase, KCPL bears the burden of proving that its proposed rate increase is just and reasonable. — Kansas City Power & Light Company 18 MPSC 3d 545.

In order to carry its burden of proof, KCPL must meet the preponderance of the evidence standard and must convince the Commission it is more likely than not that KCPL's proposed rate increase is just and reasonable. — Kansas City Power & Light Company 18 MPSC 3d 545.

While a utility has the burden of proof, there is initially a presumption that its expenditures are prudent.- Kansas City Power & Light Company 18 MPSC 3d 545.

It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served. — Kansas City Power & Light Company 18 MPSC 3d 545.

Determining what is in the interest of the public is a balancing process in which the total interests of the public served must be assessed, meaning that some of the public may suffer adverse consequences for the total public interest. — Kansas City Power & Light Company 18 MPSC 3d 545.

Individual rights are subservient to the rights of the public and the “public interest” necessarily must include the interests of both the ratepaying public and the investing public. — Kansas City Power & Light Company 18 MPSC 3d 545.

§27. Finality and conclusiveness

The Commission refused to rehear a portion of its report and order to modify the approved fuel adjustment clause to allow AmerenUE to recoup a portion of the revenue it expects to lose because of decreased sales of electricity to Noranda’s aluminum smelting plant due to damage to the plant resulting from a severe ice storm.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 442.

The Commission denied applications for rehearing that restated positions the Commission previously rejected in its report and order. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 443.

The Commission does not have authority to stay the effect of its orders while judicial review is obtained. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 443.

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision. — KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Pursuant to Article V, Section 18 of the Missouri Constitution, and Section 536.100, RSMo 2000, all final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

Pursuant to Sections 386.500 and 386.510, RSMo 2000, any interested person, party or entity may seek a writ of review with the circuit court for the purpose of having the reasonableness or lawfulness of the Commission’s final order or decision inquired into or determined. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

No cause or action arising out of any order or decision of the commission shall accrue in any court unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing, and the applicant shall not in any

court urge or rely on any ground not so set forth in its application for rehearing. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. —KCP&L Greater Missouri Operations Company 18 MPSC 3d 469.

The Commission denied an application for rehearing that restated positions the Commission previously rejected in its report and order. —Laclede Gas Company 18 MPSC 3d 517.

§28. Arbitration

Commission Rule 4 CSR 240-36.040(24) allows the Commission to adopt, modify, or reject an arbitrator's final report, in whole or in part.—Charter Fiberlink-Missouri, LLC 18 MPSC 3d 452.

The Commission has no legal authority to interpret a contract provision that would purport to compel the contracting parties to submit a contract dispute to mediation before the Commission.—Lake Region Water & Sewer Company 18 MPSC 3d 466.

Even if both parties to a contract dispute agreed to submit their dispute to the Commission for mediation, the Commission would have no authority to hear a controversy beyond its jurisdiction. —Lake Region Water & Sewer Company 18 MPSC 3d 466.

The Commission has jurisdiction to arbitrate any open issues that are the subject of the parties' Sections 251 and 252 negotiations. – Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. 18 MPSC 3d 531.

EXPENSE

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Financing practices**
- §4. Apportionment**
- §5. Valuation**
- §6. Accounting**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power**
- §11. Gas**
- §12. Heating**
- §13. Telecommunications**
- §14. Water**

§15. Sewer

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercorporate costs or dealings

V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies

- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

EXPENSE

VI. PARTICULAR KIND OF EXPENSE

§35. Construction

The costs associated with AmerenUE's preparation and filing of the Callaway 2 application are properly treated as Construction Work in Progress (CWIP) and as such may not be included in AmerenUE's rate base until the Callaway 2 plant is fully operational and used for service.—Union Electric Company, d/b/a AmerenUE, 18 MPSC 3d 306.

§28. Advertising, promotion and publicity

The Commission does not wish to review the appropriateness of recovery through rates of the cost of individual advertisements. If on balance an advertising campaign is acceptable for recovery in rates, then the cost of individual advertisements within that campaign should be recoverable. —Union Electric Company, d/b/a AmerenUE, 18 MPSC 3d 306.

§37. Depreciation

It would be inappropriate to adjust a few depreciation rates without looking at all depreciation rates in a complete depreciation study. —Union Electric Company, d/b/a AmerenUE, 18 MPSC 3d 306.

§39. Donations

The Commission has no authority to compel a utility's shareholders to make a charitable contribution. —Union Electric Company, d/b/a AmerenUE, 18 MPSC 3d 306.

§64. Salaries and wages

The Commission will approve company offered incentive compensation plans if the overall plan is appropriate, but will not attempt to manage the details of that plan by disallowing a portion of the cost of that plan.—Union Electric Company, d/b/a AmerenUE, 18 MPSC 3d 306.

§67. Taxes

AmerenUE was not required to recognize as deferred taxes the amount of its uncertain tax positions is ultimately expects to pay with interest to the IRS.—Union Electric Company, d/b/a AmerenUE, 18 MPSC 3d 306.

GAS

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Abandonment or discontinuance**
- §5. Liability for damages**
- §6. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally**
- §11. Leakage, shrinkage and waste**
- §12. Location**
- §13. Additions and betterments**
- §14. Extensions**
- §15. Maintenance**
- §16. Safety**

IV. OPERATION

- §17. Operation generally**
- §17.1. Purchased Gas Adjustment (PGA)**
- §17.2. Purchased Gas-incentive mechanism**
- §18. Rates**
- §19. Revenue**
- §20. Return**
- §21. Service**
- §22. Weatherization**
- §23. Valuation**
- §24. Accounting**

- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Depreciation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums

- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements
- §72. Management, administration and financing fees
- §73. Materials and supplies
- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses
- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research
- §81. Salaries and wages
- §82. Savings in operation
- §83. Securities redemption or amortization
- §84. Taxes
- §85. Uncollectible accounts
- §86. Administrative expense
- §87. Engineering and superintendence expense
- §88. Interest expense
- §89. Preliminary and organization expense
- §90. Expenses incurred in acquisition of property
- §91. Demand charges
- §92. Expenses incidental to refunds for overcharges

GAS

I. IN GENERAL

§1. Generally

The Missouri Public Service Commission concludes that Atmos filed a detailed Annual Report that complies with the Commission's general directive with regard to providing information on the impact of its fixed delivery charge rate design on energy efficiency and conservation. The Office of The Public Counsel provides no valid reason to launch an investigation when another report is already scheduled to be completed once additional data has been collected.—Atmos Energy Corporation 18 MPSC 3d 425.

§3. Certificate of convenience and necessity

The Commission granted Missouri Gas Utility a certificate of convenience and necessity to provide natural gas service in portions of Pettis and Benton counties. – Missouri Gas Utility, Inc. 18 MPSC 3d 524.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Commission lost jurisdiction to amend, clarify or take any other action with regard to its Report and Order, issued on February 22, 2007, once the appeal of that decision was accepted by the courts.

However, the courts have no jurisdiction to review the Commission's interlocutory

orders concerning ancillary issues, and finding Atmos' report to be compliant and denying the Office of The Public Counsel's request for an investigation related to the report are interlocutory.—Atmos Energy Corporation 18 MPSC 3d 425.

IV. OPERATION

§17.1. Purchased Gas Adjustment (PGA)

Laclede's tariff that would allow the company to recover the portion of its bad debt expense ascribed to gas costs through its PGA clause is unlawful in that it would allow Laclede to recover bad debt expense in a manner that would constitute forbidden single-issue ratemaking. – Laclede Gas Company 18 MPSC 3d 507.

Laclede's bad debt expense is not a gas cost such as can be recovered through the PGA clause. – Laclede Gas Company 18 MPSC 3d 507.

MANUFACTURED HOUSING

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

II. WHEN A PERMIT IS REQUIRED

- §6. When a permit is required generally**
- §7. Operations and construction**

III. GRANT OR REFUSAL OF A PERMIT

- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
- §10. Who may possess**
- §11. Public safety**

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally**
 - §13. Duration of the permit**
 - §14. Modification and amendment of the permit generally**
 - §15. Transfer, mortgage or lease generally**
 - §16. Revocation, cancellation and forfeiture generally**
 - §17. Acts or omissions justifying revocation or forfeiture**
 - §18. Necessity of action by the Commission**
 - §19. Penalties**
-

MANUFACTURED HOUSING

No headnotes in this volume involved the question of manufactured housing.

PUBLIC UTILITIES

I. IN GENERAL

- §1. Generally
- §2. Nature of
- §3. Functions and powers
- §4. Termination of status
- §5. Obligation of the utility

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general
- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally
- §24. Municipal plants
- §25. Municipal districts
- §26. Mutual companies; cooperatives
- §27. Corporations
- §28. Foreign corporations or companies
- §29. Unincorporated companies
- §30. State or federally owned or operated utility
- §31. Trustees

PUBLIC UTILITIES

I. IN GENERAL

§1. Generally

The Commission established the amount assessed against Missouri utilities in the 2010 fiscal year. – Assessment Fiscal Year 2010 18 MPSC 3d 617.

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally**
- §2. Jurisdiction and powers of Federal Commissions**
- §3. Jurisdiction and powers of the State Commission**
- §4. Jurisdiction and powers of the courts**
- §5. Jurisdiction and powers of local authorities**
- §6. Limitations on jurisdiction and power**
- §7. Obligation of the utility**

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally**
- §9. Right of utility to accept less than a reasonable rate**
- §10. Ability to pay**
- §11. Breach of contract**
- §12. Capitalization and security prices**
- §13. Character of the service**
- §14. Temporary or emergency**
- §15. Classification of customers**
- §16. Comparisons**
- §17. Competition**
- §18. Consolidation or sale**
- §19. Contract or franchise rate**
- §20. Costs and expenses**
- §21. Discrimination, partiality, or unfairness**
- §22. Economic conditions**
- §23. Efficiency of operation and management**
- §24. Exemptions**
- §25. Former rates; extent of change**
- §26. Future prospects**
- §27. Intercorporate relations**
- §28. Large consumption**
- §29. Liability of utility**
- §30. Location**
- §31. Maintenance of service**
- §32. Ownership of facilities**

- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents

- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

VIII. RATE DESIGN, CLASS COST OF SERVICE

§118. Method of allocating costs

§119. Rate design, class cost of service for electric utilities

§120. Rate design, class cost of service for gas utilities

§121. Rate design, class cost of service for water utilities

§122. Rate design, class cost of service for sewer utilities

§123. Rate design, class cost of service for telecommunications utilities

§124. Rate design, class cost of service for heating utilities

RATES

V. KINDS AND FORMS OF RATES AND CHARGES

§101. Fuel clauses

The Commission approved a stipulation and agreement that resolved all fuel adjustment clause tariff rate design issues in the underlying rate case.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 297.

AmerenUE's fuel costs were substantial, beyond the control of management, and volatile in amount, thus meeting the previously established three-part test for justification for a fuel adjustment clause. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

AmerenUE was allowed to implement a fuel adjustment clause because it could not otherwise have a sufficient opportunity to earn a fair return on equity. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

AmerenUE was allowed to implement a fuel adjustment clause so that it would be able to compete for capital with other electric utilities that already have a fuel adjustment clause. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

AmerenUE was allowed to implement a fuel adjustment clause with a 95% pass through provision. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

§107. Kinds and classes of service

The Commission approved the unanimous stipulation and agreement effectively creating a 20.5 percent increase in rates for all classes, adding demand based billing provisions for larger customers in addition to its usage-based billing provisions, eliminating Vacant Building Rider and Alternate Heating Source tariffs, and adopting a new Interruptible Heating Service tariff.—Trigen-Kansas City Energy Corporation 18 MPSC 3d 80.

VIII. RATE DESIGN, CLASS COST OF SERVICE

§118. Method of allocating costs

The Peak and Average Demand allocation method used by Staff is inherently flawed as it double counts the average demand of customer classes, resulting in customers with higher load factor, in other words, industrials, being allocated an inequitable share of production plant investment. —Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 306.

SECURITY ISSUES

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Authorization by a corporation**
- §4. Conversion, redemption and purchase by a corporation**
- §5. Decrease of capitalization**
- §6. Sinking funds**
- §7. Dividends**
- §8. Revocation and suspension of Commission authorization**
- §9. Fees and expenses**
- §10. Purchase by utility**
- §11. Accounting practices**

II. JURISDICTION AND POWERS

- §12. Jurisdiction and powers in general**
- §13. Jurisdiction and powers of Federal Commissions**
- §14. Jurisdiction and powers of the State Commission**
- §15. Jurisdiction and powers of local authorities**

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

- §16. Necessity of authorization by the Commission generally**
- §17. Installment contracts**
- §18. Refunding or exchange of securities**
- §19. Securities covering utility and nonutility property**
- §20. Securities covering properties outside the State**

IV. FACTORS AFFECTING AUTHORIZATION

- §21. Factors affecting authorization generally**
- §21.1. Effect on bond rating**
- §22. Equity capital**
- §23. Charters**
- §24. Competition**
- §25. Compliance with the terms of a mortgage or lease**
- §26. Definite plans and purposes**
- §27. Financial conditions and prospects**
- §28. Use of proceeds**
- §29. Dividends and dividend restrictions**
- §30. Improper practices and irregularities**
- §31. Intercompany relations**
- §32. Necessity of issuance**
- §33. Revenue**
- §34. Rates and rate base**
- §35. Size of the company**

- §36. Title of property
- §37. Amount
- §38. Kind of security
- §39. Restrictions imposed by the security

V. PURPOSES AND SUBJECTS OF CAPITALIZATION

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
- §55. Renewals, replacements and reconstruction
- §56. Working capital

VI. KINDS AND PROPORTIONS

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

VII. SALE PRICE AND INTEREST RATES

- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
- §67. Preferred stock
- §68. No par value stock

VIII. FINANCING METHODS AND PRACTICES

- §69. Financing methods and practices generally
- §70. Leases
- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
- §74. Subscriptions and allotments

§75. Stipulation as to rate base

IX. PARTICULAR UTILITIES

§76. Telecommunications

§77. Electric and power

§78. Gas

§79. Sewer

§80. Water

§81. Miscellaneous

SECURITY ISSUES

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

§16. Necessity of authorization by the Commission generally

Pursuant to Section 393.190, no security interest against the whole or part of the sewer company that is necessary in the performance of its duty to the public can be issued without prior Commission approval.—Stoddard County Sewer Company, Inc., R.D. Sewer Co., LLC 18 MPSC 3d 264.

SERVICE

I. IN GENERAL

§1. Generally

§2. What constitutes adequate service

§3. Obligation of the utility

§4. Abandonment, discontinuance and refusal of service

§5. Contract, charter, franchise and ordinance provisions

§6. Restoration or continuation of service

§7. Substitution of service

§7.1. Change of supplier

§8. Discrimination

II. JURISDICTION AND POWERS

§9. Jurisdiction and powers generally

§10. Jurisdiction and powers of the Federal Commissions

§11. Jurisdiction and powers of the State Commission

§12. Jurisdiction and powers over service outside of the state

§13. Jurisdiction and powers of the courts

§14. Jurisdiction and powers of local authorities

§15. Limitations on jurisdiction

§16. Enforcement of duty to serve

III. DUTY TO SERVE

§17. Duty to serve in general

§18. Duty to render adequate service

- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

SERVICE

II. JURISDICTION AND POWERS

§11. Jurisdiction and powers of the State Commission

The Commission promulgated Commission Rule 4 CSR 240-23.030, making the reporting requirements the Commission ordered in the case redundant; thus, the Commission

ordered that AmerenUE is excused from filing the same information twice with the Commission.—Union Electric Company, d/b/a AmerenUE 18 MPSC 3d 460.

SEWER

I. IN GENERAL

- §1. Generally**
- §2. Certificate of convenience and necessity**
- §3. Obligation of the utility**
- §4. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the Federal Commissions**
- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of local authorities**
- §9. Territorial agreements**

III. OPERATIONS

- §10. Operation generally**
- §11. Construction and equipment**
- §12. Maintenance**
- §13. Additions and betterments**
- §14. Rates and revenues**
- §15. Return**
- §16. Costs and expenses**
- §17. Service**
- §18. Depreciation**
- §19. Discrimination**
- §20. Apportionment**
- §21. Accounting**
- §22. Valuation**
- §23. Extensions**
- §24. Abandonment or discontinuance**
- §25. Reports, records and statements**
- §26. Financing practices**
- §27. Security issues**
- §28. Rules and regulations**
- §29. Billing practices**
- §30. Eminent domain**
- §31. Accounting Authority orders**

SEWER

I. IN GENERAL

§1. Generally

The Commission corrected its conclusions of law but retained its findings of facts pursuant to the Circuit Court's finding that the Commission's findings of statutory violations were unlawful.—Central Jefferson County Utilities, Inc. 18 MPSC 3d 75.

The Commission approved the transfer of assets from Stoddard County Sewer Company, Inc., to R.D. Sewer Co., L.L.C. after determining the transfer would not be detrimental to the public interest.—Stoddard County Sewer Company, Inc. and R.D. Sewer Co., LLC 18 MPSC 3d 132.

The Commission voided security interests delineated in the order.—Stoddard County Sewer Company, Inc. and R.D. Sewer Co., LLC 18 MPSC 3d 259.

Because the Missouri Secretary of State indicates that no security interests are on file in its office again Stoddard County Sewer Company, Inc., the Commission cancels its previous order requiring R.D. Sewer Company, L.L.C. (Stoddard County's successor in interest) to file a copy of the Commission's October 23, 2008 "Order Concluding Security Interests Void as a Matter of Law."—Stoddard County Sewer Company, Inc. and R.D. Sewer Co., LLC 18 MPSC 3d 263.

Pursuant to Section 386.500, RSMo 2000, the Commission concludes that Public Counsel has failed to demonstrate a sufficient reason for granting its application for rehearing or its request for a stay of the October 23, 2008 Report and Order.—Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 278.

§2. Certificate of convenience and necessity

Based on a stipulation and agreement filed by the parties, the Commission found that Mid MO Sanitation's request for authority to own and operate a sewer system is necessary or convenient for the public service. – Mid MO Sanitation, LLC 18 MPSC 3d 542.

The Commission found that Highway H Utilities' request for authority to own and operate a water and sewer system is necessary or convenient for the public service. – Highway H Utilities, Inc. 18 MPSC 3d 612.

§3. Obligation of the utility

Pursuant to Section 386.570, RSMo 2000, R.D. Sewer Company, L.L.C. is obligated, subject to statutory penalty, to comply with the Commission's order requiring it to file order declaring security interests void. Canceling the order, cancels the obligation.—Stoddard County Sewer Company, Inc., and R.D. Sewer Co. LLC 18 MPSC 3d 263.

§4. Transfer, lease and sale

Security interests issued against the whole or part of Stoddard County Sewer Company, Inc. that is necessary in the performance of its duty to the public without prior Commission approval are void.—Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 264.

II. JURISDICTION AND POWERS

§5. Jurisdiction and powers generally

Stoddard County and R. D. Sewer are "sewer corporations" and a "public utilities," as defined in Sections 386.020(49) and (43), RSMo Cum. Supp. 2008, respectively, and are

subject to the jurisdiction, supervision, and control of the Commission.-- Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 264.

The Office of the Public Counsel voluntarily submitted to the Commission's jurisdiction by exercising its discretionary authority to participate in this action. Section 386.710.1; Commission Rule 4 CSR 240-2.010(11).—Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 278.

III. OPERATIONS

§14. Rates and revenues

The Commission approved the unanimous agreement regarding disposition of small sewer company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.—Aqua Missouri, Inc. 18 MPSC 3d 47.

The Commission approved the unanimous agreement regarding disposition of small sewer company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.—Aqua Missouri, Inc. 18 MPSC 3d 56.

§25. Reports, records and statements

A certified copy of the Commission's order voiding the non-approved security interests must be filed with County Recorder and Registrar of Deeds and Records, and with the Missouri Secretary of State, unless otherwise directed by the Commission.—Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 264.

§26. Financing practices

Pursuant to Section 393.190, no security interest against the whole or part of the sewer company that is necessary in the performance of its duty to the public can be issued without prior Commission approval.-- Stoddard County Sewer Company, Inc., and R.D. Sewer Co., LLC 18 MPSC 3d 264.

STEAM

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Transfer, lease and sale**
- §4.1. Change of suppliers**
- §5. Charters and franchise**
- §6. Territorial agreements**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally**
- §8. Jurisdiction and powers of Federal Commissions**
- §9. Jurisdiction and powers of the State Commission**
- §10. Jurisdiction and powers of the local authorities**
- §11. Territorial agreements**
- §12. Unregulated service agreements**

III. OPERATIONS

- §13. Operations generally**
- §14. Rules and regulations**
- §15. Cooperatives**
- §16. Public corporations**
- §17. Abandonment and discontinuance**
- §18. Depreciation**
- §19. Discrimination**
- §20. Rates**
- §21. Refunds**
- §22. Revenue**
- §23. Return**
- §24. Services generally**
- §25. Competition**
- §26. Valuation**
- §27. Accounting**
- §28. Apportionment**
- §29. Rate of return**
- §30. Construction**
- §31. Equipment**
- §32. Safety**
- §33. Maintenance**
- §34. Additions and betterments**
- §35. Extensions**
- §36. Local service**
- §37. Liability for damage**
- §38. Financing practices**
- §39. Costs and expenses**
- §40. Reports, records and statements**
- §41. Billing practices**
- §42. Planning and management**
- §43. Accounting Authority orders**
- §44. Safety**
- §45. Decommissioning costs**

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally**
- §47. Physical connection**
- §48. Contracts**
- §49. Records and statements**

STEAM

I. IN GENERAL

- §1. Generally**

Missouri Public Service Commission recognized name change from Aquila, Inc., d/b/a Greater Missouri Operations Company to KCP&L Greater Missouri Operations Company.—Aquila, Inc., d/b/a KPC&L Greater Missouri Operations Company 18 MPSC 3d 276.

III. OPERATIONS

§20. Rates

The Commission approved the unanimous stipulation and agreement effectively creating a 20.5 percent increase in rates for all classes, adding demand based billing provisions for larger customers in addition to its usage-based billing provisions, eliminating Vacant Building Rider and Alternate Heating Source tariffs, and adopting a new Interruptible Heating Service tariff.—Trigen-Kansas City Energy Corporation 18 MPSC 3d 80.

The Commission approved a stipulation and agreement that resolved KCP&L Greater Missouri Operations Company's request for a general rate increase. — KCP&L Greater Missouri Operations Company 18 MPSC 3d 595.

TELECOMMUNICATIONS

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
 - §3.1. Certificate of local exchange service authority**
 - §3.2. Certificate of interexchange service authority**
 - §3.3. Certificate of basic local exchange service authority**
- §4. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities**
- §6. Jurisdiction and powers of Federal Commissions**
- §7. Jurisdiction and powers of the State Commission**

III. OPERATIONS

- §8. Operations generally**
- §9. Public corporations**
- §10. Abandonment or discontinuance**
- §11. Depreciation**
- §12. Discrimination**
- §13. Costs and expenses**
 - §13.1. Yellow Pages**
- §14. Rates**
 - §14.1 Universal Service Fund**
- §15. Establishment of a rate base**
- §16. Revenue**
- §17. Valuation**
- §18. Accounting**
- §19. Financing practices**

- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally , or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

TELECOMMUNICATIONS

I. IN GENERAL

§1. Generally

The Commission cancelled the certificate of service authority after giving notice and receiving no response.—Winstar Communications, LLC 18 MPSC 3d 101.

The Commission found that charges associated with the porting of telephone numbers were unauthorized under the interconnection agreement between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC. In coming to this conclusion the Commission looked to the wording of the agreement, and then to past behavior of the companies.—Charter Fiberlink-Missouri, LLC 18 MPSC 3d 120.

§4. Transfer, lease and sale

Section 252 of the Telecommunications Act of 1996 authorizes the Commission to arbitrate unresolved issues in the negotiation of an interconnection agreement.—Charter Fiberlink-Missouri, LLC 18 MPSC 3d 452.

V. ALTERNATIVE REGULATION AND COMPETITION

§46.1 Interconnection Agreements-Arbitrated

The Commission has jurisdiction to arbitrate any open issues that are the subject of the parties' Sections 251 and 252 negotiations. – Sprint Communications Company L.P., Sprint Spectrum L.P., and Nextel West Corp. 18 MPSC 3d 531.

VALUATION

I. IN GENERAL

- §1. Generally**
- §2. Constitutional limitations**
- §3. Necessity for**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of local authorities**

III. METHODS OR THEORIES OF VALUATION

- §9. Methods or theories generally**
- §10. Purpose of valuation as a factor**
- §11. Rule, formula or judgment as a guide**
- §12. Permanent and tentative valuation**

IV. ASCERTAINMENT OF VALUE

- §13. Ascertainment of value generally**
- §14. For rate making purposes**
- §15. Purchase or sale price**
- §16. For issuing securities**

V. FACTORS AFFECTING VALUE OR COST

- §17. Factors affecting value or cost generally**
- §18. Contributions from customers**
- §19. Appreciation**
- §20. Apportionment of investment or costs**
- §21. Experimental or testing cost**
- §22. Financing costs**
- §23. Intercompany relationships**

- §24. Organization and promotion costs
- §25. Discounts on securities
- §26. Property not used or useful
- §27. Overheads in general
- §28. Direct labor
- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
- §36. Contingencies and omissions
- §37. Contractor's profit and loss
- §38. Administrative expense
- §39. Legal expense
- §40. Promotion expense
- §41. Miscellaneous

VI. VALUATION OF TANGIBLE PROPERTY

- §42. Buildings and structures
- §43. Equipment and facilities
- §44. Land
- §45. Materials and supplies
- §46. Second-hand property
- §47. Property not used and useful

VII. VALUATION OF INTANGIBLE PROPERTY

- §48. Good will
- §49. Going value
- §50. Contracts
- §51. Equity of redemption
- §52. Franchises
- §53. Leases and leaseholds
- §54. Certificates and permits
- §55. Rights of way and easements
- §56. Water rights

VIII. WORKING CAPITAL

- §57. Working capital generally
- §58. Necessity of allowance
- §59. Factors affecting allowance
- §60. Billing and payment for service
- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
- §65. Materials and supplies

- §66. Amount to be allowed
- §67. Property not used or useful

IX. DEPRECIATION

- §68. Deprecation generally
- §69. Necessity of deduction for depreciation
- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
- §73. Deduction or addition of funds or reserve

X. VALUATION OF PARTICULAR UTILITIES

- §74. Electric and power
- §75. Gas
- §76. Heating
- §77. Telecommunications
- §78. Water
- §79. Sewer

VALUATION

No headnotes in this volume involved the question of valuation.

WATER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale
- §5. Joint Municipal Utility Commissions

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the State Commission
- §9. Jurisdiction and powers of local authorities
- §10. Receivership
- §11. Territorial Agreements

III. OPERATIONS

- §12. Operation generally
- §13. Construction and equipment
- §14. Maintenance

- §15. Additions and betterments
 - §16. Rates and revenues
 - §17. Return
 - §18. Costs and expenses
 - §19. Service
 - §20. Depreciation
 - §21. Discrimination
 - §22. Apportionment
 - §23. Accounting
 - §24. Valuation
 - §25. Extensions
 - §26. Abandonment or discontinuance
 - §27. Reports, records and statements
 - §28. Financing practices
 - §29. Security issues
 - §30. Rules and regulations
 - §31. Billing practices
 - §32. Accounting Authority orders
-

WATER

I. IN GENERAL

§1. Generally

The Commission entered default judgment in favor of Guy Thomas because the respondent's response did not state good cause to set aside the default judgment.—Evergreen Lakes Water Supply 18 MPSC 3d 25.

The Commission determined that the Gladlo Water & Sewer Company had effectively abandoned its water system in Phelps County, Missouri. Gladlo failed to respond to a notice of petition for appointment of a receiver, so the Commission entered an order granting default.—Gladlo Water & Sewer Company, Inc. 18 MPSC 3d 104.

The Missouri Public Service Commission denies the Office of the Public Counsel's request for the Commission to review a Contract for Retail Sale and Delivery of Potable Water between Missouri-American Water Company and Premium Pork, L.L.C. authorized in File No. WT-2004-0192. — Missouri-American Water Company 18 MPSC 3d 535.

§2. Certificate of convenience and necessity

The Commission found that Highway H Utilities' request for authority to own and operate a water and sewer system is necessary or convenient for the public service. — Highway H Utilities, Inc. 18 MPSC 3d 612.

II. JURISDICTION AND POWERS

§6. Jurisdiction and powers generally

The Office of the Public Counsel voluntarily submitted to the Commission's jurisdiction by exercising its discretionary authority to participate in this action. Section 386.710.1; Commission Rule 4 CSR 240-2.010(11). — Missouri-American Water Company 18 MPSC 3d 535.

MAWC is a “water corporation,” a “sewer corporation” and a “public utility” as those terms are defined in Sections 386.020(59), 386.020(49) and 386.020(43) RSMo Cum. Supp. 2008, respectively, and is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. – Missouri-American Water Company 18 MPSC 3d 535.

III. OPERATIONS

§16. Rates and revenues

The Commission approved the unanimous agreement regarding disposition of small water company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.—Aqua Missouri, Inc. 18 MPSC 3d 38.

The Commission approved the unanimous agreement regarding disposition of small water company revenue increase request, pursuant to conditions, and approved the revised tariff sheets.—Aqua Missouri, Inc. 18 MPSC 3d 65.

The Commission approved the proposed tariff sheets after finding them just and reasonable. The Commission also approved the proposed Disposition Agreement and depreciation rates.—Tri-States Utility, Inc. 18 MPSC 3d 102.

The Commission authorized MAWC to perform according to an agreement negotiated between MAWC and Premium Pork, L.L.C. (Premium Pork is currently known as Triumph Foods, L.L.C.) for the retail sale and delivery of water. – Missouri-American Water Company 18 MPSC 3d 535.

Commission review of the continued appropriateness of the alternative rate set forth in the contract after the initial five years of the contract is authorized by MAWC’s Economic Development Rider tariff (“EDR”). – Missouri-American Water Company 18 MPSC 3d 535.

The result of any contract review conducted under the EDR may only be implemented in a general rate proceeding. – Missouri-American Water Company 18 MPSC 3d 535.

§20. Depreciation

The Commission approved the proposed tariff sheets after finding them just and reasonable. The Commission also approved the proposed Disposition Agreement and depreciation rates.—Tri-States Utility, Inc. 18 MPSC 3d 102.
